

## ARTICLE

# CHARTER SCHOOL ACCESSIBILITY FOR HISTORICALLY DISADVANTAGED STUDENTS: THE EXPERIENCE IN NEW JERSEY

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## INTRODUCTION

Fifty years after the landmark decision of *Brown v. Board of Education*,<sup>1</sup> the issue of whether state educational systems are providing equal educational opportunities for historically disadvantaged students remains unsettled.<sup>2</sup> The issue has recently received additional attention as states have moved toward offering increased opportunities for school choice, including the establishment of charter schools.<sup>3</sup> The emergence

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<sup>1</sup> 347 U.S. 483 (1954) (prohibiting the continuation of segregated public schools because such schools violated the equal protection of African-American students); see RICHARD KLUGER, *SIMPLE JUSTICE* (1976) (explaining the issues involved in *Brown*).

<sup>2</sup> Recent scholarship has determined that many school districts still remain highly segregated. See GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 16-47*, (Harvard Univ., The Civil Rights Project, 2001), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Schools\\_More\\_Separate.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf). Additionally, much of the debate over statewide systems of school funding has been predicated on the concern that historically discriminated students have not been receiving equal or adequate educational funding. These cases have typically focused on students in low-income urban districts in which students of racial and ethnic minorities comprise a disproportionate percentage of the enrollment. See KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW 886-903* (5th ed. 2001). Beginning in California in 1972, numerous state supreme courts have ruled for providing additional assistance to these students by declaring their state funding systems in violation of their state constitutions. See *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 95 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929, 958 (Cal. 1976); *Serrano v. Priest*, 226 Cal. Rptr. 584, 519-520 (Cal. Ct. App. 1986); *Horton v. Meskill*, 376 A.2d 359, 374-76 (Conn. 1977); *Knowles v. State Bd. of Educ.*, 547 P.2d 699, 700, 704 (Kan. 1976); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215-16 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989), amended by 784 P.2d 412, 413-14 (Mont. 1990); *Robinson v. Cahill*, 303 A.2d 273, 297-98 (N.J. 1973); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394-97 (Tex. 1989); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 99-104 (Wash. 1978) (en banc); *State ex rel. Bd. of Educ. v. Manchin*, 366 S.E.2d 743, 749-50 (W. Va. 1988); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wisc. 1989); *Buse v. Smith*, 247 N.W.2d 141, 155 (Wis. 1976); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 340 (Wyo. 1980).

<sup>3</sup> In this Article, the term "charter school" conforms to a definition provided by Joe Nathan, one of the original founders of the charter school movement. See JOE NATHAN, *CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION 1* (1996). Hence charter schools are public schools, financed by the same per-pupil funds that other public schools receive. *Id.* In most jurisdictions, the state department of education holds charter schools accountable for achieving certain minimal educational results. *Id.* In return, charter schools are entitled to receive waivers from many of the restrictions and bureaucratic rules imposed on traditional public schools. *Id.* Nathan maintains that charter schools—for the first time in public education—combine four basic concepts: "1) choice among public schools for families and their children; 2) entrepreneurial opportunities for educators and

and expansion of the charter school movement in the United States has been one of the most significant components of public school choice during the last decade.<sup>4</sup> Seymour Sarason has classified the charter school movement as “the most radical educational reform effort in the post World War II era.”<sup>5</sup> By the beginning of the 2003–04 academic year, more than 2,500 charter schools were operating in thirty-eight states and the District of Columbia.<sup>6</sup>

Despite the apparent success of the charter school movement, representatives of historically disadvantaged students have voiced concern that charter schools may not be providing equal access to disadvantaged students.<sup>7</sup> These advocates have maintained that equal educational opportunity must remain one of the public education system's most important objectives, insisting that the institutions of public school systems must be vigilant in eradicating patterns of inequality, discrimination, and segregation.<sup>8</sup> In the aftermath of *Brown*, advocates have especially sought to advance opportunities for African-American and other minority students in their efforts to secure greater access to programs and achieve more integrated settings.<sup>9</sup> Similar efforts have since been extended on behalf of female students, students with disabilities,

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parents to create the kinds of schools they believe make the most sense; 3) explicit responsibility for improved achievement, as measured by standardized tests and other measures; and 4) carefully designed competition in public education.” *Id.*

<sup>4</sup> See BRYAN C. HASSEL, *THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE* 1 (1999).

<sup>5</sup> SEYMOUR B. SARASON, *CHARTER SCHOOLS: ANOTHER FLAWED EDUCATIONAL REFORM?*, at vii (1998).

<sup>6</sup> See Internet Education Exchange, *The State of Charter Schools Nationwide* (Mar. 20, 2002) (listing basic information on charter schools), at [www.iedx.org/article\\_1.asp?ContentID=EN520&SectionGroupID=STATISTICS](http://www.iedx.org/article_1.asp?ContentID=EN520&SectionGroupID=STATISTICS) (last visited Mar. 20, 2004).

<sup>7</sup> See Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 343–53 (1997) (concluding that charter schools do not serve the disabled equally); Betsy Levin, *Race and School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 266, 276–86 (Steven D. Sugarman & Frank R. Kemerer eds., 1999) (discussing research that shows minorities in some states being treated disparately in charter school enrollment).

<sup>8</sup> See Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 272 (1999).

<sup>9</sup> See *id.* at 273–74 (arguing quality and equality should come together).

immigrant students, and other students with limited English proficiency.<sup>10</sup>

Martha Minow, one of the most distinguished of these advocates,<sup>11</sup> observed that the demands of “the law-driven equity movement” need to be carefully evaluated with respect to charter school programs to determine whether these fledgling schools are complying with the requirements and achieving the goals of applicable civil rights law.<sup>12</sup> Minow and other commentators also voiced alarm that state policymakers have implemented charter school programs that may result primarily in enhancing opportunities for well-to-do and well-informed families while reducing opportunities for the poor and less informed, especially minority families residing in low-income, urban districts.<sup>13</sup>

In this Article I study the extent to which at least one state—New Jersey—may be jeopardizing the long-standing goal of equal opportunity in its eagerness to establish a statewide charter school program. In January 1996, New Jersey became the twentieth state to enact charter school enabling legislation.<sup>14</sup> Pursuant to the Act’s provisions, New Jersey permits local parents, teachers, and community organizations to establish individual charter schools.<sup>15</sup> Commencing with the 1997–98 academic year, the New Jersey State Board of Education has been authorized to approve the opening of charter schools.<sup>16</sup> In

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<sup>10</sup> *Id.* at 273 (noting that reforms also addressed financial inequalities both interstate and intrastate).

<sup>11</sup> *See id.* at 257. Minow is the William Henry Bloomberg Professor of Law at Harvard Law School, as well as a Professor at the Harvard School of Education. Her research includes the field of education as well as equality and inequality, human rights, law and social change, and religion and pluralism.

<sup>12</sup> *Id.* at 258.

<sup>13</sup> *See, e.g.,* Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K–12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1556–58 (1995) (noting that transportation costs keep low income students out of distant charter schools).

<sup>14</sup> N.J. STAT. ANN. § 18A:36A-1 to -18 (West 1996). Since almost forty states and the District of Columbia have now enacted charter school enabling acts, New Jersey can be considered as being one of the states that established its program during the middle phase of charter school initiatives. From that perspective, it makes a suitable example to discuss its experience in the treatment of historically disadvantaged students.

<sup>15</sup> *See id.* § 18A:36A-4(a) (listing various ways to establish a charter school).

<sup>16</sup> *See id.* § 18A:36A-3(a) (exercising power through a commissioner-appointed board of trustees).

2003–04, more than fifty charter schools existed in New Jersey, serving approximately 13,000 students.<sup>17</sup>

I begin the study by discussing the concerns that previous commentators have raised regarding charter school accessibility to historically disadvantaged students. Next, I identify and explain those federal and state laws intended to facilitate equal educational opportunity for historically disadvantaged students in public educational institutions such as charter schools. I then proceed to disclose potential problem areas that historically disadvantaged students have experienced with regard to charter school accessibility, indicated by empirical research data, the outcomes of state and federal case law, and the complaints filed with state and federal regulatory agencies. Finally, I propose several ways in which New Jersey's charter school program might be modified to achieve the goals of equal educational opportunity more successfully.

#### I. PREVIOUS COMMENTARY ON CHARTER SCHOOL ACCESSIBILITY FOR HISTORICALLY DISADVANTAGED STUDENTS

Previous commentary contributed by legal scholars emphasizes that investigation should be undertaken to ensure that issues related to equal educational opportunities for historically disadvantaged students are adequately addressed in state charter school programs.<sup>18</sup> Martha Minow expressed concern that recently enacted charter school initiatives may foster neglect or abandonment of the goals that were the cornerstone of the "last wave" of school reforms emanating from *Brown v. Board of Education*<sup>19</sup> and subsequent federal civil rights litigation and legislation.<sup>20</sup> In her commentary, Minow discussed how this earlier reform movement used schools as an appropriate and necessary forum to attack patterns of inequality, discrimination, and segregation.<sup>21</sup> In addition to

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<sup>17</sup> A full list of currently approved schools is set forth in Appendix E, *infra*.

<sup>18</sup> See Levin, *supra* note 7, at 276; Minow, *supra* note 8, at 257, 271–73. Although none of the leading commentary has specifically targeted New Jersey, it clearly implicates that state's charter school program. See Levin, *supra* note 7, at 276–77 (noting that data on racial equality has not been adequately addressed in any charter program in any state).

<sup>19</sup> 347 U.S. 483 (1954).

<sup>20</sup> Minow, *supra* note 8, at 258 (noting that current choice reforms result in single schools of top quality but not a large number of high-quality schools).

<sup>21</sup> See *id.* at 272 (noting that civil rights reformers believed schools were the

their efforts to promote educational opportunities through integrated settings for minority students, reformers subsequently took up the struggle to enhance educational opportunities for other students of low socioeconomic status, female students, students with disabilities, and students with limited English proficiency.<sup>22</sup>

Minow maintained that “[l]egal rights and remedies became the levers for change.”<sup>23</sup> She pointed out, however, that federal courts generally found no legal basis in the absence of demonstrable harm from prior race discrimination to impose remedies solely addressing inequities of educational opportunity.<sup>24</sup> Yet, despite the inadequacies of previous efforts to promote equality, Minow asserted that they should not be abandoned.<sup>25</sup> She observed that “each of the equality efforts has advanced a vision of an inclusive society, capable of and committed to redressing exclusions and the widespread mistreatments of people due to reasons beyond their own control.”<sup>26</sup>

These efforts were part of a larger “public mission[] of forging commonality, [fostering] civic engagement in a diverse [society], and offering quality [educational] opportunities on an equal basis.”<sup>27</sup> Minow argued that educators must continue to pursue this mission, even as new reformers pursue their own vision of a better educational system through charter schools and other choice proposals.<sup>28</sup> Thus, Minow insisted that it is imperative to build on or, as she expresses it, to transform past school reform, rather than simply replace it and start from scratch.<sup>29</sup> She feared that leaders of the choice movement decided to dismiss prior reform efforts and to promote equity

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appropriate forum through which to attack).

<sup>22</sup> *Id.* at 273 (discussing how later reforms looked at financial inequalities between schools).

<sup>23</sup> *Id.*

<sup>24</sup> *See id.* at 275 (discussing how reformers believe this financial inequality is the true problem).

<sup>25</sup> *Id.* at 280 (extolling her commitment to a society that is non-exclusive and redresses financial mistreatment).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 282.

<sup>28</sup> *See id.* at 285 (arguing that no charter school should discriminate against protected classes or force families to pay money above the voucher).

<sup>29</sup> *See id.* at 287 (concluding that charter schools should share information about reforms that are working).

only indirectly.<sup>30</sup> She cautioned that their new “reforms” might forego the ideal of common, public institutions because they “[were] premised on self-segregation and sorting, and they encourage[d] competitors to slice off sectors, to skim for excellence, to celebrate competition over dialogue, and exit over debate.”<sup>31</sup>

Minow predicted that those within the education community who are still committed to promoting equity will pursue legal challenges, if necessary, to preserve and protect existing rights.<sup>32</sup> Through litigation or other means, they will seek to ensure that the bureaucratic freedom legislatures have accorded charter schools does not include the ability to ignore laws designed to combat discrimination against groups identified in terms of race, class, gender, disability, language, and religion.<sup>33</sup> Minow acknowledged, however, that judicial decisions are not the best means of providing such assurance because they are too remote and indirect.<sup>34</sup> Alternatively, she proposed that advocates of equity should strive to make certain that newly adopted legislation includes appropriate restrictions and guidelines.<sup>35</sup>

With that in mind, Minow presented five basic questions that she maintains policymakers need to answer to ensure that the governing legislation and corresponding regulations covering charter schools properly address issues pertaining to equality and quality:

Can a participating charter [ ] school exclude students on the basis of race, class, or religion?

Can a participating [charter] school reserve places for students of one race or gender in order to produce a desired balance or mix?

Under what, if any, conditions can a participating [charter] school restrict enrollment to students of one gender, or students with or without particular disabilities, or students with or without English language proficiency?

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<sup>30</sup> See *id.* at 282 (finding that we should not “risk abandoning our longstanding commitment to a common future”).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 283.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 284.

<sup>35</sup> *Id.*

Can participating schools mitigate the tendency toward segregation along the many lines of difference among students by joining in system-wide programs or activities?

How will participating schools be evaluated and how can analysis be generated to permit parents, school administrators, governmental and non-governmental leaders, as well as other community members, to assess [charter schools generally] as well as to assess particular [charter] schools?<sup>36</sup>

Minow asserted that policymakers should address each of these questions with specificity and back up their positions with viable enforcement possibilities.<sup>37</sup> Although she did not attempt to provide a complete blueprint, she set forth general recommendations. She suggested that no charter school that receives public funding be permitted to exclude applicants on the basis of race, class, or religion.<sup>38</sup> She also suggested that no charter school be permitted to exclude persons of one sex, persons with disabilities, or persons with limited English proficiency unless the school is part of a cooperative plan with other schools that provide comparable opportunities for those excluded from the charter school.<sup>39</sup> She further recommended that segregation that occurs by design or by a pattern of self-selection in an individual charter school be mitigated by requiring the school to participate in a district or regional program that mixes students enrolled in different schools, programs, or in both.<sup>40</sup> Finally, she contended that each charter school be required to join in an information-gathering system with uniform guidelines to permit comparisons, and that the data include results on standardized tests as well as richer measures of school programming, implementation, and performance.<sup>41</sup>

Betsy Levin adopted essentially the same position as Minow, expressing concern that school choice options such as charter schools “will lead to increased racial and economic isolation.”<sup>42</sup> Like Minow, Levin suggested that the best means of minimizing

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 284–85.

<sup>38</sup> *Id.* at 285.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Levin, *supra* note 7, at 276.

this potential problem is through carefully crafted legislation.<sup>43</sup> She developed a checklist of “features” that policymakers should consider in designing charter school programs to ensure equality of opportunity for racial and other historically disadvantaged students. In her “model school choice design,” Levin requested that policymakers consider the following topics:

- (1) means of preventing increased racial and economic stratification, (2) adequacy and accessibility of information, (3) method of selection, and (4) the equality of resources.<sup>44</sup>

Levin's first three topics, like Minow's first four questions, deal primarily with participation and exclusion. Levin's final topic, like Minow's final question, concerns the issue of quality and implies the need for administrative oversight and accountability. Their criteria are particularly useful because they are directed at improving the framework of charter school programs through constructive statutory and regulatory revision, rather than through acrimonious litigation challenging questionable practices. Thus, Minow and Levin raised significant issues pertaining to inclusion but left to others the task of application at the state level in order to successfully address these concerns.

In pursuing that objective, Huffman<sup>45</sup> and Biegel<sup>46</sup> offered recommendations to make charter school programs more compliant with federal goals related to equal protection law. Like Minow and Levin, they agreed that “quiet and thoughtful approaches” in the design of charter school programs may make more of a difference in children's lives than efforts of enforcement by means of litigation.<sup>47</sup> Both Huffman and Biegel recommended, as did Levin, that states should impose mandatory distribution of information about charter schools at “parent information centers” to facilitate equal access.<sup>48</sup> Both recommended that states should forbid charter schools from requiring parents to contribute either time or money, so as to prevent less able or willing parents from discouraging their

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<sup>43</sup> *Id.* at 286–89.

<sup>44</sup> *Id.* at 286–93.

<sup>45</sup> Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1316–27 (1998).

<sup>46</sup> Biegel, *supra* note 13, at 1578–84.

<sup>47</sup> *See id.* at 1583–84.

<sup>48</sup> *Id.* at 1583; Huffman, *supra* note 45, at 1326.

children from pursuing these educational options.<sup>49</sup> As an alternative to prohibiting the payment of any required fees, Biegel suggested that schools adopt a sliding scale based on parents' ability to pay.

Moreover, both Huffman and Biegel recommended that states provide transportation funding to charter school students that live beyond walking distance from school.<sup>50</sup> Both also suggested proactive steps that states should take to promote diversity: Huffman recommended that states set diversity goals to motivate them to achieve greater racial balancing within the lottery system context,<sup>51</sup> Biegel recommended that states base diversity goals on models used in higher education.<sup>52</sup> Moreover, Huffman concurred with Minow and Levin in urging increased state oversight to ensure greater school accountability.<sup>53</sup>

Another distinguished legal commentator, Jay Heubert,<sup>54</sup> recommended specific ways to reduce potential conflicts between the operation of charter schools and the goal of protecting students with disabilities.<sup>55</sup> Agreeing with Minow and Levin's basic premise, Heubert contended that the commitment to assist students at risk should not be compromised in the attempt to advance the success of the charter school movement.<sup>56</sup> He affirmed that both objectives can be pursued—even though they may produce tensions—and observed that students with disabilities stand to gain at least as much from the potential advantages of charter schools as non-disabled students.<sup>57</sup> Given their typically small class sizes and innovative techniques, charter schools might help reduce the number of students dependent on special education programs operated by traditional schools, which frequently have been burdened with highly

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<sup>49</sup> See Biegel, *supra* note 13, at 1582; Huffman, *supra* note 45, at 1327.

<sup>50</sup> See Biegel, *supra* note 13, at 1580; Huffman, *supra* note 45, at 1326.

<sup>51</sup> Huffman, *supra* note 45, at 1327.

<sup>52</sup> See Biegel, *supra* note 13, at 1580. Since the date of Biegel's 1995 commentary, some of the higher education models he relied on for enhancing minority representation have been challenged successfully in court and should no longer be followed.

<sup>53</sup> See Huffman, *supra* note 45, at 1328.

<sup>54</sup> Jay Heubert is Chair of the Department of Organization and Leadership at Teachers College, Columbia University, and is also an adjunct professor of school law at Columbia Law School.

<sup>55</sup> See Heubert, *supra* note 7, at 348–50.

<sup>56</sup> *Id.* at 348.

<sup>57</sup> *Id.*

bureaucratic and formal systems of referral, evaluation, and placement.<sup>58</sup>

Heubert asserted that charter schools may be able to overcome some of the difficulties that traditional schools encounter in servicing disabled students by aggressively pursuing several strategies.<sup>59</sup> Charter schools can seek to initiate clustering and inter-district cooperative arrangements in circumstances where more than one school shares the same distinctive mission.<sup>60</sup> In those instances where cooperative arrangements are unavailable, charter schools can still seek to reduce costs and time-consuming tasks by sharing special education specialists on a part-time basis with either traditional or other charter schools.<sup>61</sup> In addition, charter schools can seek to draw upon the resources of local school districts and state education departments, as well as special education lawyers and other charter school advocates, for advice and technical assistance in meeting their compliance obligations.<sup>62</sup>

Finally, Heubert suggested that charter schools can seek relief through statutory remedies.<sup>63</sup> They can strive to persuade state lawmakers to amend funding formulas to provide supplemental aid for charter school, or to persuade federal lawmakers to amend special education laws to permit less burdensome means of identifying and serving students with disabilities.<sup>64</sup> Alternatively, they can strive to amend the state enabling act to stipulate that special educational instruction in charter schools be placed under the control of the local school board.<sup>65</sup> Although such an amendment would undoubtedly reduce the autonomy of charter schools, it would probably enable them to more thoroughly meet the rigorous demands of federal disability law.<sup>66</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 310.

<sup>60</sup> *Id.* at 340.

<sup>61</sup> *Id.* at 349.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 350.

<sup>64</sup> *Id.* at 349–50.

<sup>65</sup> *Id.* at 351.

<sup>66</sup> *Id.*

## II. APPLICABLE LAW ON CHARTER SCHOOL ACCESSIBILITY FOR HISTORICALLY DISADVANTAGED STUDENTS

### A. *Applicable Federal Law*

The most fundamental federal protection for historically disadvantaged students emanates from the United States Constitution, and its most applicable provision is the Equal Protection Clause of the Fourteenth Amendment. It states, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>67</sup> This clause, however, may not offer as much protection as its sweeping language suggests. Courts will presumably accord charter school programs the same high degree of deferential treatment that they have accorded traditional public school systems. Consequently, unless a plaintiff can establish that a defendant charter school’s actions resulted from intentional discrimination or explicit classifications against historically disadvantaged students, the plaintiff will not prevail.<sup>68</sup> Without such a showing, the courts will apply only a “rational relationship” test in weighing challenges against charter school programs.<sup>69</sup>

A defendant can usually satisfy this standard by demonstrating that contested actions or classifications have a legitimate objective and that the means chosen to achieve that objective are not unreasonable.<sup>70</sup> A plaintiff can only sustain his burden of proof by establishing that an alleged discriminatory act was intentional—meaning it was done, at least in part because of, not merely in spite of, its adverse effects.<sup>71</sup> For example, if a plaintiff established that charter school officials had deliberately informed only certain parents about their school

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<sup>67</sup> U.S. CONST. amend. XIV, § 1.

<sup>68</sup> This assumes that the challenges are not based on an alleged infringement of rights of persons whom the Supreme Court has deemed to fall within a “suspect classification,” including persons comprising a historically disadvantaged race or gender. See Karla A. Turekian, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1391 (1997).

<sup>69</sup> The Supreme Court has ruled that most educational challenges deserve only a minimal level of scrutiny based on its determination that education is not a fundamental right as specifically embodied in the United States Constitution. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–35 (1973).

<sup>70</sup> See *id.* at 40.

<sup>71</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the District of Columbia test for police officers was not unconstitutional solely because of racially discriminatory impact; a discriminatory purpose must be proven).

in order to admit as many students as possible of a certain race or ethnicity, that action would constitute intentional discrimination. However, a plaintiff often finds it difficult to substantiate such claims;<sup>72</sup> thus, the Equal Protection Clause's value in assisting historically disadvantaged students appears quite limited.

In addition to pursuing constitutional challenges, historically disadvantaged students may also challenge discriminatory practices at New Jersey's charter schools by applying certain federal civil rights laws. Like many other states, New Jersey has structured its charter school program so that it remains eligible to receive federal funding. In so doing, it has agreed to meet specified requirements that the federal government has imposed on those states that have chosen to pursue federal grants. Among those requirements is the mandate that New Jersey charter schools must comply with enumerated federal laws set forth in the definitional section of the 1994 Strengthening and Improvement of Elementary and Secondary Schools Act, as amended by the Charter Schools Expansion Act.<sup>73</sup> Five of those enumerated laws apply to historically disadvantaged students: (1) Title VI of the Civil Rights Act of 1964;<sup>74</sup> (2) Title IX of the Education Amendments of the Civil Rights Act of 1964;<sup>75</sup> (3) Section 504 of the Rehabilitation Act of 1973;<sup>76</sup> (4) Title II of the Americans with Disabilities Act;<sup>77</sup> and (5) Part B of the Individuals with Disabilities Education Act.<sup>78</sup> I will briefly discuss the application of each act, as well as other relevant federal civil rights laws.

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<sup>72</sup> See *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1067 (9th Cir. 1999) (holding that California had a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools and that the use of race/ethnicity in its admissions is narrowly tailored to achieve the necessary laboratory environment to produce research results which can be used to improve the education of California's ethnically diverse urban public school population); see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–85 (1982); *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1381 (1978); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 242 (1973); *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45–46 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

<sup>73</sup> See 20 U.S.C. § 8066 (repealed 2002).

<sup>74</sup> See 42 U.S.C. §§ 2000d to 2000d-7 (2000).

<sup>75</sup> See 20 U.S.C. §§ 1681–1688 (2000).

<sup>76</sup> See 29 U.S.C. § 794 (2000).

<sup>77</sup> See 42 U.S.C. §§ 12101–12213.

<sup>78</sup> See 20 U.S.C. §§ 1400–1487.

Title VI prohibits discrimination based on race, color, or national origin in the operation of any federally assisted program.<sup>79</sup> Its ultimate enforcement weapon is the potential denial of federal funds, which would include federal charter school grants.<sup>80</sup> Some federal court rulings have established that plaintiffs do not need to prove intentional discrimination in order to prevail but may rely on an effects standard; a showing that a certain practice has a disproportionately negative effect on a suspect class, such as historically disadvantaged students.<sup>81</sup> Once plaintiffs have established a prima facie case by demonstrating a discriminatory effect, defendants assume the burden of proving that the practice is educationally necessary and that there are no less detrimental means of achieving their educational objective.<sup>82</sup> However in the 1978 landmark case *Regents of the University of California v. Bakke*,<sup>83</sup> the Supreme Court placed restrictions on the use of Title VI to advance the interests of minorities and other historically disadvantaged groups through reliance on an effects standard.<sup>84</sup> The more

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<sup>79</sup> Section 601 of Title VI reads as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 14 U.S.C. § 2000d (2000). The act was enacted in accordance with the constitutional authority vested in Congress to enact legislation to enforce the Fourteenth Amendment.

<sup>80</sup> It should be noted that in the 2002–03 academic year, Congress authorized over eleven million dollars to New Jersey in charter school grants, and the annual amount has been steadily increasing as New Jersey has increased its number of charter schools. See Press Release, New Jersey Department of Education, New Jersey Awarded Federal Funds for Charter School Development (Oct. 28, 2002), available at <http://www.state.nj.us/njded/news/2002/1028chart.htm> (last visited Mar. 20, 2004).

<sup>81</sup> See *Guardians Ass'n. v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 591–92 (1983); *Sharif ex rel. Salahuddin v. State Educ. Dep't*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989).

<sup>82</sup> A defendant may justify a practice by proving that it is demonstrably necessary to meet an important educational goal and bears a manifest relationship to classroom education. See *Salahuddin*, 709 F. Supp. at 361–62. Plaintiffs, however, can still prevail by showing the existence of less discriminatory alternatives to the challenged practice. See *id.* at 362–64.

<sup>83</sup> 438 U.S. 265 (1978).

<sup>84</sup> For advocates seeking protections for historically disadvantaged students, the *Bakke* decision proved detrimental in that it restricted the ability of educational institutions to admit as many minority students as they might prefer if those students did not possess academic qualifications as strong as other applicants. See *id.* at 315–16. The decision no longer enabled institutions to use quotas and other formulaic means to ensure that a representative percentage of racial minorities were enrolled in their educational programs. See *id.* at 318–19. Nevertheless, it still

recent decision in *Alexander v. Sandoval*<sup>85</sup> has probably had the most profound impact on the ability of advocates of historically disadvantaged students to utilize Title VI to pursue equal educational opportunities.<sup>86</sup> In that case, the Supreme Court has apparently eliminated the right of private individuals to bring Title VI claims based on the effects standard. Justice Scalia, writing for the majority, opined that “[s]o far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action.”<sup>87</sup> Therefore, unless historically disadvantaged students can prove intentional discrimination—the same level of proof as required for equal protection claims—such students will probably not receive much assistance from Title VI in challenges against New Jersey charter schools for alleged discriminatory practices.<sup>88</sup>

The second law referenced in the federal charter school legislation is Title IX of the Education Amendments of the Civil Rights Act of 1964. In 1972 Congress enacted this Act as a means to induce educational institutions to end gender discrimination.<sup>89</sup> Like Title VI, Title IX uses the potential denial of federal funding as its primary enforcement incentive.<sup>90</sup> A 1988 amendment to Title IX clarified that the Act covers an

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permitted educational institutions to extend limited preferential treatment to students based on grounds of inclusion and diversity. *See id.* at 318–20. The predilection of such institutions, however, to rely on diversity as a major justification for admission of a larger number of historically disadvantaged students has continued to come under judicial review. The recent United States Supreme Court decision in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), has presumably clarified the amount of discretion that educational institutions, including charter schools, may use in their efforts to enroll a more inclusive and diverse student body. *See id.* at 2347. In so doing, the decision appears to have undermined previously existing practices deliberately designed to assist educational opportunities of historically disadvantaged students.

<sup>85</sup> 532 U.S. 275 (2001).

<sup>86</sup> *See* Linda Greenhouse, *Supreme Court Limits Scope of a Main Civil Rights Law*, N.Y. TIMES, Apr. 25, 2001, at A14.

<sup>87</sup> *See Sandoval*, 532 U.S. at 289.

<sup>88</sup> The United States government—as opposed to private litigants—may still bring a Title VI “effects” case against a charter school program if it so chooses. *See id.* at 289–91.

<sup>89</sup> Section 1681 reads as follows: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2000).

<sup>90</sup> The withholding of federal funding is not the Act’s only means of inducing compliance. It also authorizes courts to utilize general equitable relief to accomplish its requirements. *See id.* § 1682.

entire institution or system, not just a particular program receiving federal assistance.<sup>91</sup> Several Supreme Court decisions have also made clear that the scope of the Act covers sexual harassment of students at a public school.<sup>92</sup> Because Title IX is closely patterned after Title VI, however, its ability to provide protections to students based on an effects standard may be compromised in the same way that Title VI has been restricted because of the Supreme Court's holding in *Sandoval*.

The other three laws referenced in the federal charter school legislation applying to historically disadvantaged students deal specifically with persons with disabilities. Those laws, section 504 of the Rehabilitation Act of 1973 ("section 504"), Title II of the Americans with Disabilities Act (ADA), and the Individuals with Disabilities Education Act (IDEA), overlap, but in some instances impose separate and enhanced protections and thus additional requirements on public schools.<sup>93</sup> Because the United States Department of Education (USDOE) has determined that Title II of the ADA incorporates the substantive requirements of section 504, I shall follow the lead of Mead and discuss section 504 and the ADA simultaneously.<sup>94</sup>

As with many civil rights laws, section 504 applies to all agencies receiving federal funds for any purpose and stipulates that those funds may be forfeited if disabled persons, including students, can sustain charges of discrimination.<sup>95</sup> The law also permits federal courts to invoke equitable relief to assist victims

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<sup>91</sup> See The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 2, 102 Stat. 28, 28 (1988) (correcting a perceived loophole arising from the Supreme Court's holding in *Grove City College v. Bell*, 465 U.S. 555 (1984)).

<sup>92</sup> See, e.g., *Gesber v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). In that case the Court noted that the criteria for establishing liability against a school requires that "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.* at 277.

<sup>93</sup> See Heubert, *supra* note 7, at 314.

<sup>94</sup> The ADA extends nondiscrimination provisions to the workplace regardless of whether an employer receives federal funding. See Julie F. Mead, *Determining Charter Schools' Responsibilities for Children with Disabilities: A Guide Through the Legal Labyrinth*, 11 B.U. PUB. INT. L.J. 167, 169 (2002). Title II addresses a school's treatment of students with disabilities, and "[i]ts requirements mirror those of Section 504 in the public school contexts." *Id.*

<sup>95</sup> Section 504 states: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794(a) (2000).

of such discrimination.<sup>96</sup> Section 504 covers five topics that pertain to the educational needs of disabled students: (1) location and notification; (2) free appropriate public education; (3) educational setting; (4) evaluation and placement; and (5) procedural safeguards.<sup>97</sup> In 1988, Congress, by statutory amendment, removed any doubt that section 504 applies to all operations of educational institutions, public or private, that receive federal funding.<sup>98</sup>

Enacted in 1990, the Individuals with Disabilities Education Act (IDEA) incorporates many provisions of earlier federal legislation and requirements for litigation, guaranteeing all disabled students the right to a free and appropriate public education.<sup>99</sup> In order to qualify for IDEA funding, a state must prepare a plan describing the policies and procedures governing the expenditure of its federal funding and must also meet specific federal statutory and regulatory requirements. Should a state fail to meet those requirements, the IDEA empowers the Secretary of Education to suspend all IDEA payments.<sup>100</sup>

As did its predecessor,<sup>101</sup> the IDEA requires compliance in six general areas: (1) a free appropriate education; (2) an individualized education program; (3) special educational services; (4) related services; (5) due process procedures; and (6) the least restrictive and appropriate environment in which to learn.<sup>102</sup> Its language makes clear that the critical term "special education" means services designed "to meet the unique [educational] needs of [the handicapped] child."<sup>103</sup> The IDEA

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<sup>96</sup> See 20 U.S.C. § 1403(b) (2000).

<sup>97</sup> 29 U.S.C. § 794; 34 C.F.R. §§ 104.31–104.36 (2003).

<sup>98</sup> See The Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, § 4, 102 Stat. 28, 28 (1988).

<sup>99</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>100</sup> It should be observed, however, that at least one federal circuit court has limited the impact arising from a state's failure to comply with *all* IDEA requirements. See *Commonwealth v. Riley*, 106 F.3d 559 (4th Cir. 1997). In that case the court ruled that the USDOE could not withhold all of Virginia's IDEA funding simply because the Commonwealth had refused to comply with one requirement. The state had refused to provide tutors to disabled students who had been suspended or expelled for serious misconduct unrelated to their disabilities. See *id.* at 561.

<sup>101</sup> See Education for All Handicapped Children Act (EAHCA) of 1975, Pub. L. No. 94–142, 89 Stat. 773 (1975).

<sup>102</sup> 20 U.S.C. §§ 1412–1413; 34 C.F.R. §§ 300.121–300.130.

<sup>103</sup> This language was inserted as part of a 1983 amendment to IDEA's predecessor, the EAHCA. See 20 U.S.C. § 1401(25).

defines disabled children as those who are mentally retarded, hard of hearing, deaf, speech impaired, language impaired, visually handicapped (including blindness), seriously emotionally disturbed, orthopedically impaired, or otherwise health impaired.<sup>104</sup> The definition also includes students with specific learning disabilities who require special education and related services.<sup>105</sup> The 1997 amendments to the IDEA have made further changes affecting eligibility, evaluation, programming, private school placements, discipline, funding, attorney's fees, dispute resolution, and procedural safeguards.<sup>106</sup>

It should be emphasized that charter schools are required to adhere to all of the rules and procedures of federal disabilities law.<sup>107</sup> For those charter schools that operate independently of local school districts—as almost all New Jersey charter schools do—they must assume the same responsibilities as the local school district since they effectively operate as their own “local education agency” (LEA).<sup>108</sup> As such, charter schools must

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<sup>104</sup> *Id.* § 1401(3)(a)(i).

<sup>105</sup> *Id.* § 1401(3)(a)(ii). One of the more common disabilities not specifically listed under the IDEA is attention deficit hyperactivity disorder (ADHD). Nevertheless, ADHD children may be covered under the IDEA or under section 504, which requires coverage of students if a major life activity—such as education—is affected. Although section 504 requires schools to accommodate qualified children, it is less prescriptive than the IDEA.

<sup>106</sup> See generally Dixie Snow Huefner, *The Individuals with Disabilities Education Act Amendments of 1997*, 122 ED. L. REP. 1103 (1998).

<sup>107</sup> See Heubert, *supra* note 7, at 313–14.

<sup>108</sup> A “local education agency” is defined by the IDEA as follows:

(A) The term “local educational agency” means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

(B) The term includes—

- (i) an educational service agency, as defined in paragraph (4); and
- (ii) any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(C) The term includes an elementary or secondary school funded by the Bureau of Indian Affairs, but only to the extent that such inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this chapter with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of

provide appropriate services to all students who fall within the scope of federal disability law.<sup>109</sup>

As Jay Heubert has pointed out, these obligations are substantial.<sup>110</sup> Because of their limited size and resources, charter schools may claim that they are not equipped to offer the full extent and range of services and thus should be exempted from such obligations. They may further claim that they lack the ability to hire qualified personnel to identify and classify students in accordance with an individualized education plan and to provide sufficient facilities and staffing to meet the unique educational needs of classified students. Nevertheless, federal requirements make it clear that charter schools cannot ignore such mandates—even if federal and state funding prove inadequate to cover the cost of administering the requisite services.<sup>111</sup>

Although not specifically cited in the federal legislation pertaining to charter schools, one additional federal law is worth describing because it has been the primary vehicle for persons to obtain damages and equitable relief against state and local officials who violate their constitutional rights. The Civil Rights Act of 1871, as codified in 42 U.S.C. § 1983, enables a person who is denied constitutional or statutory rights to bring an action against the offending party, which may be a school board, individual school board member, administrator, teacher, or any other public official responsible for the alleged offense.<sup>112</sup> To

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Indian Affairs.  
20 U.S.C. § 1401(15).

<sup>109</sup> As discussed above, there are three federal disability laws that apply to public schools, including public charter schools, and schools operated by private entities that accept federal funding. The first is the IDEA, 20 U.S.C. §§ 1401–1491. The second is section 504 of the 1973 Rehabilitation Act, which prevents discrimination on the basis of disability in any federally assisted program. 29 U.S.C. § 794 (2000). The third is Title II of the ADA, which provides coverage similar to that of section 504. 42 U.S.C. §§ 12181–12189 (2000). The Equal Protection Clause of the Fourteenth Amendment also inhibits these schools from engaging in intentional differential treatment of students with disabilities. Because the IDEA, section 504, and Title II provide more extensive and particularized protections, however, advocates generally rely on these statutes rather than on the constitutional provision to secure protections.

<sup>110</sup> See Heubert, *supra* note 7, at II.

<sup>111</sup> *Id.* at 312.

<sup>112</sup> See 42 U.S.C. § 1983 (2000), which reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the

obtain relief, a plaintiff must prove a violation of some federal provision, such as the Equal Protection Clause, Title VI, Title IX, section 504, or the IDEA.<sup>113</sup> In some instances, however, students who may not be able to establish that a charter school's policy has resulted in discriminatory practices may still obtain relief by suing the school in state court or by suing an individual employee in federal or state court for violation of their civil rights.<sup>114</sup>

### *B. Applicable State Law*

As with federal law, the most fundamental state law that controls the operation of charter schools emanates from the constitution. In a highly acclaimed law journal article, Paul Tractenberg<sup>115</sup> identified three major provisions in New Jersey's constitution that may be used to assist historically disadvantaged students in acquiring greater equal educational opportunities.<sup>116</sup> All three are directly applicable to charter schools as part of the public school system.<sup>117</sup>

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jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

<sup>113</sup> See *infra* Part III.C.

<sup>114</sup> Justice O'Connor provided an illustration of this situation in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 292 (1998). Writing for the majority, Justice O'Connor ruled that the school district could not be held responsible because of an alleged violation of a student's rights under Title IX. In her concluding remarks, however, she observed that "[o]ur decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983." *Id.*

<sup>115</sup> Paul Tractenberg is the Alfred C. Clapp Public Service Professor of Law at Rutgers School of Law-Newark. He is also the founder and first director of the Education Law Center, Inc., which has represented plaintiffs in the landmark educational cases of *Robinson v. Cahill* and *Abbott v. Burke* for more than three decades. See Rutgers School of Law-Newark, *Faculty-Bio: Paul Tractenberg*, at <http://law.Newark.Rutgers.edu/facbio/tractenberg.html> (last visited Mar. 20, 2004).

<sup>116</sup> See Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 836-39 (1998).

<sup>117</sup> The statute reads in part: "A charter school shall be a public school operated under a charter granted by the commissioner." N.J. STAT. ANN. § 18A:36A-3(a) (West 1999).

The first is the state's equal protection provision, an affirmative right found in Article I of the constitution.<sup>118</sup> The New Jersey Supreme Court construed the "Rights and Privileges" article to embrace a very broad form of equal protection that is available to all persons.<sup>119</sup> The court has declared that New Jersey's equal protection provision sometimes affords greater protection than its federal counterpart, and it and lower state courts have used the provision to assist public school students in obtaining more and better educational resources.<sup>120</sup>

The second provision is a negative constraint that deals strictly with public education.<sup>121</sup> It is found in Article I, paragraph 5 and provides, "No person shall be . . . segregated . . . in the public schools, because of religious principles, race, color, ancestry or national origin."<sup>122</sup> The state courts interpreted this provision in a way that enabled them to remedy both de jure and de facto segregation in public school systems.<sup>123</sup> The courts especially utilized this provision to prevent schools and school districts from discriminating against students on the basis of race.<sup>124</sup>

The third provision derives from the constitutional responsibility of the state government to provide certain educational benefits to schoolchildren. The provision, referred to as the T & E Clause, is found in Article VIII, section IV, paragraph 1.<sup>125</sup> It states, "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of

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<sup>118</sup> N.J. CONST. art. I, ¶ 5.

<sup>119</sup> See, e.g., N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 761 (N.J. 1994); State v. Hunt, 450 A.2d 952, 955 (N.J. 1982); Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975).

<sup>120</sup> The state constitution's equal protection provision has been used in conjunction with the T & E clause, see *infra* note 125 and accompanying text, to provide some of the underpinning for the state's famous school financing decisions. See, e.g., Robinson v. Cahill, 287 A.2d 187, 210-12 (N.J. Super. Ct. Law Div. 1972).

<sup>121</sup> See Tractenberg, *supra* note 116, at 861-62.

<sup>122</sup> N.J. CONST. art. I, ¶ 5.

<sup>123</sup> Tractenberg, *supra* note 116, at 865 (citing Booker v. Bd. of Educ., 212 A.2d 1 (N.J. 1965)).

<sup>124</sup> See *id.* Tractenberg cites the language of the leading case, *Jenkins v. Township of Morris School District*, in which the state supreme court said, "The history and vigor of our State's policy in favor of a thorough and efficient public school system are matched in its policy against racial discrimination and segregation in the public schools." 279 A.2d 619, 626 (N.J. 1971).

<sup>125</sup> N.J. CONST. art. VIII, § IV, ¶ 1.

free public schools [for children].”<sup>126</sup> In its interpretation, the New Jersey Supreme Court determined that the T & E Clause obligates the Legislature to accord students in *Abbott*, i.e., “special needs” school districts, with a high level of educational opportunity that will enable them to compete successfully with other public school students.<sup>127</sup> Because most of the state’s charter schools have been established in *Abbott* districts,<sup>128</sup> the New Jersey Supreme Court may require their students to receive the same level of educational opportunity as students enrolled in traditional *Abbott* schools.<sup>129</sup> The court has previously held that *Abbott* students are entitled to receive not only enriched educational programs, but also on-site health and social services.<sup>130</sup>

As part of its statutory framework, New Jersey has enacted several laws that accord significant protections to persons who encounter discrimination.<sup>131</sup> The most comprehensive of these statutory safeguards is New Jersey’s Law Against Discrimination (LAD).<sup>132</sup> The Act affirms that all persons shall

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<sup>126</sup> *Id.*

<sup>127</sup> See Tractenberg, *supra* note 116, at 888 (citing *Abbott v. Burke*, 710 A.2d 450, 462–64 (N.J. 1998)). This case is known as *Abbott V*. See *id.* at 888 n.347.

<sup>128</sup> *Abbott* districts are the product of approximately thirty years of extensive and controversial dialogue, litigation, and thirteen decisions of the New Jersey Supreme Court. See NEW JERSEY DEPARTMENT OF EDUCATION, GUIDE FOR IMPLEMENTING URBAN EDUCATION REFORM IN ABBOTT DISTRICTS VII-13 to -50 (2000) (explaining the criteria and process, as well as the origins), available at <http://www.state.nj.us/njded/abbotts/archives/guide.htm>. According to NJDOE data, in the 2002–03 academic year, fifty-three charter schools were operating in New Jersey. Among those were forty-four schools that were located in—or, as regional schools, enrolling students who resided in—the state’s thirty *Abbott* school districts. One-third of New Jersey’s charters schools were located in the state’s three take-over districts, which also represent the three largest *Abbott* districts. Ten charter schools were located in Newark, six in Jersey City, and two in Paterson. See *infra* app. E.

<sup>129</sup> As noted above, charter schools are public schools for all intents and purposes. See *supra* note 117 and accompanying text.

<sup>130</sup> Tractenberg, *supra* note 116, at 927–28 (citing *Abbott*, 710 A.2d at 467).

<sup>131</sup> It should be observed that the New Jersey Supreme Court has held that more recent New Jersey statutory law supersedes conflicting prior statutory law. See *In re Schuman*, 552 A.2d 602, 608 (N.J. 1989). Thus any directly conflicting statutory law that predates New Jersey’s Charter School Program Act cannot be used as a basis for challenging that act. Only previous constitutional provisions and non-conflicting statutory law are relevant in considering whether New Jersey’s Charter School Program Act has complied with state law designed to promote the goal of providing equal educational opportunity for historically disadvantaged students.

<sup>132</sup> See N.J. STAT. ANN. § 10:5-1 (West 1986). Another statute of consequence is

have the opportunity to obtain all of the advantages, facilities, and privileges of any place of public accommodation without discrimination on account of their "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, sex or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons."<sup>133</sup> The Act's provisions have also been extended to "any person because such person is or has been at any time handicapped."<sup>134</sup> Additionally and pursuant to the Act, the New Jersey Division of Civil Rights has issued regulations that have significantly strengthened LAD's protections.<sup>135</sup>

LAD is certainly applicable to students who seek to enroll, or are presently enrolled in, New Jersey's charter schools, which undoubtedly represent places of "public accommodation."<sup>136</sup> Moreover, the New Jersey Supreme Court, in interpreting the intent of the Legislature, declared that "the overarching goal of LAD to eliminate the cancer of discrimination is to be achieved through a liberal construction of its provisions."<sup>137</sup> Consequently, the statute is not only important because of its scope and relevance to charter school practices, but also because

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New Jersey's Conscientious Employee Protection Act, or the "Whistleblower Law," which provides safeguards for employees who inform appropriate authorities about wrongful practices in their workplace. *Id.* § 34:19-1. Hence, this law would afford protection to charter school employees who might choose to inform educational authorities about discriminatory practices occurring within their institutions.

<sup>133</sup> *See id.* § 10:5-4.

<sup>134</sup> *See id.* § 10:5-4.1. The New Jersey courts have interpreted the word "handicapped," as set forth in this act, to mean essentially the same as the word "disability," as set forth in the federal Americans with Disabilities Act (ADA).

<sup>135</sup> For example, recent departmental regulations now require institutions with public accommodations to offer services in the most integrated settings appropriate, and they do not permit the institutions to offer separate services if persons with disabilities object. *See* Community Health Law Project (2002), <http://www.chlp.org/programs>.

<sup>136</sup> Although the United States Supreme Court ruled that the application of LAD violated the Boy Scouts' First Amendment right to freedom of association in the landmark case of *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000), the statute still remains enforceable in New Jersey. The Supreme Court determined that the Boy Scouts constituted a group whose use of a facility did not make that facility a "public accommodation." *Id.* It seems apparent that, unlike the Boy Scouts, New Jersey's public schools are unquestionably a form of public accommodation for the education of their own students. Therefore, the related actions of public schools would not be affected by the Supreme Court's ruling in *Dale*.

<sup>137</sup> *Viscik v. Fowler Equip. Co.*, 800 A.2d 826, 833 (N.J. 2002).

it serves as a clear illustration of the strong commitment that New Jersey and its courts have taken in providing means to combat discrimination against historically disadvantaged persons—including those at-risk students attending any of the state’s public schools.<sup>138</sup>

### *C. Preference in Utilization of Federal or State Law*

Based on the foregoing analysis of state and federal laws that may be utilized to provide greater educational opportunity for historically disadvantaged students, it appears that state law may be more effective than federal law in certain circumstances in its application to New Jersey charter schools. For most instances of alleged discriminatory practices based on a student’s race or economic status, New Jersey law provides more protection than federal law. In this regard, “[s]tate court litigation under state constitutional provisions has seized center stage and shows little sign of relinquishing it.”<sup>139</sup> On the other hand, federal law has been particularly helpful in securing additional resources to female students and to students with disabilities.<sup>140</sup> It remains unclear whether state or federal law may be more effective for students with limited English proficiency (LEP). In many cases the results may hinge on overlapping factors. Since many LEP students may be members of protected racial or ethnic minorities, state law may better serve them. If, however, they are deemed to have physical, mental or emotional problems, they may be better served by federal disability law, especially since New Jersey has not adopted policies in its regulatory scheme that exceed the protections accorded by section 504 or the IDEA.

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<sup>138</sup> Even the United States Supreme Court has commented that the New Jersey Supreme Court provided an “extremely broad” definition of “public accommodation” in LAD as a means of protecting specific persons and groups against discrimination. *Dale*, 530 U.S. at 657.

<sup>139</sup> Tractenberg, *supra* note 116, at 830. It should also be recalled that New Jersey’s Law Against Discrimination (LAD) provides substantial statutory protection that augments other protections provided in the state constitution.

<sup>140</sup> Because states are required to adopt policies to implement the IDEA, 20 U.S.C. § 1400 (2000) in order to secure federal funding, it is conceivable that such policies could accord more protections to students with disabilities than federal statutory and regulatory law. My research, however, has not revealed such a trend, at least not in New Jersey.

### III. INDICATIONS OF PROBLEM AREAS IN NEW JERSEY CHARTER SCHOOLS

#### A. *Problem Areas Identified in Empirical Research Studies*

##### 1. Indications in New Jersey Studies

The most incisive study that identified potential problem areas in the way New Jersey charter schools treat historically disadvantaged students is the New Jersey Department of Education (NJDOE) "status report," submitted by then Commissioner Hesse in December 1999.<sup>141</sup> This study indicates that, in general, the student population of charter schools reflects that of the local school district with respect to students' race and economic status.<sup>142</sup> Overall, in 1999–2000, African-American and Latino students comprised slightly more than 80% of the total student enrollment in the then existing forty-seven charter schools, as compared to 83% of the district enrollment.<sup>143</sup> Economically disadvantaged students, most of whom were African-American or Latino, comprised 49% of the total charter school enrollment, as compared to 50% of the enrollment in the local school district.<sup>144</sup>

Despite the general findings, it is apparent that disparities have resulted among individual charter schools in certain districts, especially in the thirty *Abbott* districts in which more than two-thirds of New Jersey's charter schools are located. This conclusion is based on the raw percentage data that I have received by special request from the NJDOE, which I then subjected to statistical analysis.<sup>145</sup>

That analysis revealed that blacks<sup>146</sup> were over-represented in most charter schools—i.e., 18 out of the 27 charter schools that furnished data in 1999–2000—as compared to the status of

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<sup>141</sup> DAVID C. HESPE, REPORT ON NEW JERSEY CHARTER SCHOOLS (1999). The document is available through the New Jersey State Department of Education Public Information Office located in Trenton, New Jersey and is on file with the author.

<sup>142</sup> *Id.* at 6.

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.*

<sup>145</sup> See Appendices A through E for complete percentage data.

<sup>146</sup> This is the term used in the NJDOE data to identify students. *See infra* app. A. The other terms referring to student populations (e.g., "Hispanics") are also based on NJDOE terminology.

the local school district and that whites (15 out of 27), Hispanics (25 out of 27), Asian/Pacific Islanders (22 out of 27), and Aleutian/Native Americans (23 out of 27) were underrepresented.<sup>147</sup> This trend tended to occur regardless of the size of the local school district and regardless of its geographical location. For example, in Hoboken, a medium-sized district in northern New Jersey, blacks comprised 15.5%, whites 16.4%, Hispanics 65.5%, Asian/Pacific Islanders 2.5%, and Aleutian/Native Americans .1% of the student population of the school district in 1999–2000, while Soaring Heights Charter School reported the following percentages: black 46.6%, white 7.6%, Hispanic 31.4%, Asian/Pacific Islander 1.7%, Aleutian/Native American 12.7%.<sup>148</sup> In Trenton, a large district in central New Jersey, blacks comprised 70.2%, whites 5.2%, Hispanics 23.8%, Asian/Pacific Islanders 0.7%, and Aleutian/Native Americans 0.1% of the student population of the school district, while Trenton Community Charter School reported: black 95.7%, white 0.5%, Hispanic 3.8%, Asian/Pacific Islander 0%, Aleutian/Native American 0%.<sup>149</sup> In Camden, a large district in southern New Jersey, where blacks comprised 57.2%, whites 1.7%, Hispanics 39%, Asian/Pacific Islanders 2%, and Aleutian/Native Americans 0.1% of the student population of the school district, Camden's Promise Charter School reported the following percentages: black 81.5%, white 2.3%, Hispanic 16.2%, Asian/Pacific Islander 0%, Aleutian/Native American 0%.<sup>150</sup> In Englewood, a medium-sized district in northern New Jersey, where blacks comprised 64.5%, whites 2.7%, Hispanics 29.4%, Asian/Pacific Islanders 3.3%, and Aleutian/Native Americans 0.1% of the student population of the school district, Englewood on the Palisades Charter School reported: black 84.9%, white 1.9%, Hispanic 13.2%, Asian/Pacific Islander 0%, Aleutian/Native American 0%.<sup>151</sup> Finally, in Pleasantville, a small district near Atlantic City, where blacks comprised 71.9%, whites 2.7%, Hispanics 24.1%, Asian/Pacific Islanders 1.2%, and Aleutian/Native Americans 0.1% of the student population of the school district, the Pleasantville Charter School reported the

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<sup>147</sup> See *infra* app. A.

<sup>148</sup> See *infra* app. A.

<sup>149</sup> See *infra* app. A.

<sup>150</sup> See *infra* app. A.

<sup>151</sup> See *infra* app. A.

following percentages: black 93.4%, white 1.6%, Hispanic 3.4%, Asian/Pacific Islander 1.6%, Aleutian/Native American 0%.<sup>152</sup>

Another significant finding was that racial disparities among individual charter schools within the same municipality often varied widely and did not follow a consistent pattern. The most substantial disparity occurred in Newark, the state's largest city. Within Newark the Robert Treat Charter School reported: black 18.5%, white 4%, Hispanic 77.5%, Asian/Pacific Islander 0%, and Aleutian/Native American 0%; whereas, the North Star Charter School reported: black 88.9%, white 0%, Hispanic 11.1%, Asian/Pacific Islander 0%, Aleutian/Native American 0%.<sup>153</sup> Jersey City, the state's second largest city, also displayed similar disparities. Within that city, the Learning Community Charter School reported: black 38.3%, white 34.1%, Hispanic 20.4 %, Asian/Pacific Islander 7.2%, and Aleutian/Native Americans 0%; whereas the Jersey City Community Charter School reported: black 93.9%, white 0%, Hispanic 6.1%, Asian/Pacific Islander 0%, Aleutian/Native American 0%.<sup>154</sup>

The analysis also revealed that approximately one-third of the charter schools enrolled a substantially lower percentage of economically disadvantaged students than their districts as a whole and that the largest deviations occurred in the biggest *Abbott* districts.<sup>155</sup> Of the 27 schools that reported, approximately one-third deviated widely from their school districts, some enrolling a much lower percentage of economically disadvantaged students than their district as a whole.<sup>156</sup> As an illustration, in Jersey City, where economically disadvantaged students comprised 72.6% of the total student population, the Learning Community Charter School enrolled only 46.1% of such students and the Gateway Charter School

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<sup>152</sup> See *infra* app. A.

<sup>153</sup> See *infra* app. A. Apart from their atypical student populations, these two charter schools—the Robert Treat Academy and the North Star Charter School—have frequently been singled out as two of the best in terms of academic quality. I have personally toured both schools and have been impressed with the quality of their curricula, teachers, facilities, and student enthusiasm.

<sup>154</sup> See *infra* app. A.

<sup>155</sup> See *infra* app. B; see also Liberty Science Center Partnership Program: Abbott School Districts, available at [http://www.lsc.org/school\\_resources/partnership/links.html](http://www.lsc.org/school_resources/partnership/links.html) (last visited Mar. 20, 2004).

<sup>156</sup> See *infra* app. B.

enrolled only 53.5%; in Trenton, where economically disadvantaged students comprised 69% of the student population, the Granville School enrolled only 31% of such students and the Trenton Community School enrolled only 45.2%.<sup>157</sup> This trend also occurred in some relatively affluent suburban districts that possessed a substantial minority population. For example, in Morristown, where economically disadvantaged students comprised 24.2% of the district's population, the Unity Charter School enrolled only 2.2% of such students; and in Red Bank, where economically disadvantaged students comprised 71.4% of the district's population, the Red Bank Charter School enrolled only 46.3% of such students.<sup>158</sup>

Conversely, a substantial number of the charter schools—7 out of 27, or 26%—enrolled a significantly higher percentage of economically disadvantaged students than their districts as a whole.<sup>159</sup> The most conspicuous example was the Golden Door Charter School in Jersey City, in which 100% of the students were deemed eligible for the federal lunch program as compared to the district average of 72.6%.<sup>160</sup> All but one of these schools were located in *Abbott* districts.<sup>161</sup> Thus, the disparities in economic stratification occurred in both directions, and in some cases, opposite patterns occurred among charter schools located within the same municipality, as illustrated by several charter schools in Jersey City and Trenton.

To date, the NJDOE has not provided a research-based explanation for the marked discrepancy in the racial and economic stratification among many of the individual charter schools and has not voiced public concern. Instead, the NJDOE has suggested that the primary reason for racial and economic disparities may be attributed to non-discriminatory reasons, particularly the location of individual charter schools and the segregated living patterns of racial groups within given school districts.<sup>162</sup> A review of traditional public schools in these

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<sup>157</sup> See *infra* app. B.

<sup>158</sup> See *infra* app. B.

<sup>159</sup> See *infra* app. B.

<sup>160</sup> See *infra* app. B.

<sup>161</sup> Red Bank is not an *Abbott* District. See Liberty Science Center Partnership Program: Abbott School Districts, [http://www.lsc.org/school\\_resources/partnership/links.html](http://www.lsc.org/school_resources/partnership/links.html) (last visited Mar. 20, 2004).

<sup>162</sup> The reason cannot be attributed to racially focused academic programs, such as an Afro-centric theme, because the NJDOE has not authorized the approval of

districts lends credence to this rationale, in that it demonstrates that the local public schools in such urban districts have also exhibited wide disparities in student composition in terms of race and economic status.<sup>163</sup> Invariably, in New Jersey's larger urban municipalities, almost all of which are comprised of *Abbott* school districts, racial and ethnic groups with similar income levels tend to reside in the same neighborhoods.<sup>164</sup>

While this explanation may provide some justification for the disproportional representation in race and economic status reflected in certain charter schools, it does not take into account a fundamental difference between charter schools and traditional public schools. New Jersey's charter schools are intended to serve the entire district, and they are required to accept applications from all eligible students within their district.<sup>165</sup> In this respect, they resemble magnet schools and

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charters based on such programs. See N.J. STAT. ANN. § 18A:36A-7 (West 1999).

<sup>163</sup> It should also be noted that I attempted to undertake a statistical comparison of the racial composition of individual charter schools with the closest traditional public schools of the same grades but met with only limited success because neither the NJDOE nor local school districts were able to furnish me with the requisite data. The Executive Director of the Joint Committee on the Public Schools, however, was able to gather information for such comparisons pertaining to one charter school in Trenton and three in Jersey City. The student population of the Trenton charter school, the Emily Fisher Charter School, appeared to closely parallel the population of the nearest public school with the same grades—Martin Luther King Middle School—but the student population of the three Jersey City charter schools did not. The Jersey City Community Charter School reported: black 83.7%, white 3.4%, Hispanic 11.8%, Native American 1.4%, and Asian 0.8%; whereas Jersey City School #20 reported: black 47.3%, white 4.9%, Hispanic 38.7%, Native American 1.4%, and Asian 7.6%. The Schomberg Charter School reported: black 87.2%, white 1.9%, Hispanic 8.6%, Native American 0.5%, and Asian 1.9%; whereas Jersey City School #22 reported: black 60%, white 1.4%, Hispanic 33.9%, Native American 0.7%, and Asian 4.4%. The Liberty Charter School reported: black 73.7%, white 0%, Hispanic 27.7%, Native American 0.3%, and Asian 1.1%; whereas, Jersey City School #16 reported: black 32.8%, white 15%, Hispanic 29.3%, Native American 0%, and Asian 22.8%. In each instance, the black student population was substantially over-represented in the charter schools. Letter from the Executive Director of the Joint Committee on the Public Schools, to Robert J. Martin (on file in the Legislative Office of author).

<sup>164</sup> The most obvious example of this trend has occurred in the large public housing complexes that many of New Jersey's urban municipalities constructed after World War II. Most have been havens for the poor, consisting of large percentages of racial minorities. See N.J. SCHOOLS CONSTRUCTION CORP., FUNDING COMMUNITY SCHOOLS 1-2, 4 (Fall=2003), at [http://www.njscc.com/pdfs/sp\\_funding\\_communityschools.pdf](http://www.njscc.com/pdfs/sp_funding_communityschools.pdf); see also National Housing Institute, *In This Issue*, 77 SHELTER FORCE ONLINE 1, ¶ 1-3 (Sept./Oct. 1994), at <http://www.nhi.org/online/issues/77/inthis.html> (last visited Mar. 20, 2004).

<sup>165</sup> See N.J. STAT. ANN. § 18A:36A-8(a).

other district-wide schools and county academies.<sup>166</sup> To the extent that some charter schools, such as Robert Treat and North Star, may have achieved special prominence, they are supposed to accommodate the interests of all district-wide students who seek admission to their schools and not serve only those students who seek admission from the local neighborhood.<sup>167</sup>

Data that compares the composition of New Jersey charter schools by gender, however, has not disclosed significant disparities.<sup>168</sup> In the 27 schools that furnished data in 1999–2000, the male versus female population differed by no more than 5% in 55% of the schools, and no more than 10% in 81% of the schools.<sup>169</sup> Only one school reported an enrollment of less than 40% of either gender.<sup>170</sup> Of the 27 schools, 14 enrolled more males, and 13 enrolled more females.<sup>171</sup> In most charter schools the enrollment by gender was representative of the local district: those that enrolled more males tended to be in districts that contained a higher percentage of males at those grade levels, and those that enrolled more females tended to be in districts that contained a higher percentage of females.<sup>172</sup> Presumably, part of the explanation for such a narrow gender gap can be attributed to the fact that the New Jersey Charter Law does not permit one-sex schools and the NJDOE has not authorized the

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<sup>166</sup> The Newark School District, for example, has operated two district-wide high schools, one for the arts and one for the sciences. *See, e.g.*, Newark School of the Arts, at <http://www.ncsanj.org/> (last visited Mar. 20, 2004); Link Community School, at [http://www.linkschool.org/about\\_highschools.html](http://www.linkschool.org/about_highschools.html) (last visited Mar. 20, 2004). In addition to operating traditional vocational schools, many counties have opened academies featuring special programs, such as programs in the fine arts, marine biology and law enforcement. The counties offer admission to these academies to all students residing within those counties and frequently to students in adjacent counties.

<sup>167</sup> It should also be emphasized that, unlike many states, New Jersey obligates school districts to provide free transportation to all students who otherwise qualify and who choose to attend charter schools within the local district. *See* N.J. STAT. ANN. § 18A:36A-13. Thus, New Jersey has removed one of the major impediments to students seeking to attend a charter school outside of their local neighborhood.

<sup>168</sup> *See infra* app. C.

<sup>169</sup> *See infra* app. C.

<sup>170</sup> *See infra* app. C. That school, the Sussex County Charter School, reported an enrollment of 61.5% males and 38.5% females. The school is a high school operated adjacent to a county vocational school and focuses on career training that has traditionally been more appealing to males than females.

<sup>171</sup> *See infra* app. C.

<sup>172</sup> *See infra* app. C.

establishment of charter schools with thematic programs that have strong gender identification.<sup>173</sup> Thus gender discrimination, as may occur especially against females, appears to be one concern that has not materialized in New Jersey charter schools.

Unfortunately, New Jersey's charter schools have not displayed a similar performance record in their enrollment of students with disabilities. Statistical data received from the NJDOE have revealed that a large majority of the state's charter schools—over 64% in 1999–2000—have served a smaller percentage of students with disabilities than their local school districts.<sup>174</sup> Moreover, several charter schools enrolled no students with disabilities, even though some are located in districts where the percentage of classified students constitutes at least 5% or even 10% of the district population.<sup>175</sup> For example, in Newark, where students in special education comprised 6.4 % of the population of the local school district in 1999–2000, the Maria L. Varisco-Rogers Charter School reported 0% of its students enrolled in special education,<sup>176</sup> and in Jersey City, where students in special education comprised 10.0% of the population of the local school district, the Greenville Community Charter School also reported 0% of its students in special education.<sup>177</sup>

The NJDOE has not been able to offer a legitimate rationale for this anomaly. In fact, the Commissioner of the NJDOE acknowledged that at least some of the statistical under-representation may have resulted from a lack of effort on the part of charter schools to reach out to students with disabilities and encourage them to seek admittance.<sup>178</sup> The Commissioner

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<sup>173</sup> See N.J. STAT. ANN. § 18A:36A-7 (West 1999).

<sup>174</sup> See *infra* app. D.

<sup>175</sup> See *infra* app. D.

<sup>176</sup> See *infra* app. D. In contrast, the Marion P. Thomas Academy Charter School reported 8.3% of its students enrolled in special education programs. See *infra* app. D. Having personally served as the school board attorney for that charter school, I can attest that this school has been advised of its legal responsibilities regarding students with disabilities and has undertaken positive steps to meet them.

<sup>177</sup> See *infra* app. D.

<sup>178</sup> In speculating on the reasons for under-representation, NJDOE officials have suggested that one explanation may be due to the failure of some charter school officials to understand their obligations under the IDEA and other federal laws. They also suspect that some charter school officials may routinely advise

has also suggested that certain charter schools, especially those serving elementary grades, may not have actively attempted to identify all of the students enrolled in their schools who would be eligible to receive special educational assistance.<sup>179</sup>

Similarly, the NJDOE has not been able to account for a major deviation between the percentages of students with limited English proficiency (LEP) enrolled in New Jersey charter schools as compared to those enrolled in their corresponding school districts.<sup>180</sup> My analysis of available data has revealed that virtually all of New Jersey's charter schools have served a smaller percentage of LEP students than their local school districts.<sup>181</sup> Moreover, a large majority of the charter schools that furnished this data, i.e. 38 of 48 schools, have reported that they had enrolled no LEP students, even though in some cases LEP students comprised at least 10% of the local school district population.<sup>182</sup> For example, the Alexander Hamilton Charter School in Paterson, the state's third largest school district, reported 0%, even though the local district's percentage of LEP students was 14.27%; the Learning Center Charter School of Atlantic City reported 0%, even though the local district's percentage was 12.40%; the CALLA Charter School of Plainfield reported 0%, even though the local district's percentage was 11.31%; and the Englewood on the Palisades Charter School reported 0%, even though the local district's percentage was 10.26 %.<sup>183</sup>

Once again, the NJDOE acknowledged that the underrepresentation may have occurred largely because of inadequate recruitment policies at individual charter schools.<sup>184</sup> The NJDOE also conceded that further investigation is needed to determine whether corrective measures should be undertaken to try to achieve a more representative enrollment.<sup>185</sup> Given the level and widespread extent of the underrepresentation for both

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parents of prospective students with disabilities that the local school district probably has much greater resources to assist children with special educational needs.

<sup>179</sup> See HESPE, *supra* note 141, at 4.

<sup>180</sup> See *infra* app. E.

<sup>181</sup> See *infra* app. E.

<sup>182</sup> See *infra* app. E.

<sup>183</sup> See *infra* app. E.

<sup>184</sup> See HESPE, *supra* note 141, at 7.

<sup>185</sup> See *id.* at 4.

students with disabilities and LEP students, it seems apparent that the NJDOE must indeed conduct further investigation; moreover, it must assume a stronger leadership role in assuring that charter schools fulfill their obligation to provide these students with more realistic opportunities for inclusion.

## 2. Indications in National Studies and Studies of Other States

Several of the general studies evaluating the extent of racial and ethnic stratification in charter schools have concluded that the student composition of those schools is equivalent to that of traditional public schools.<sup>186</sup> In one study, for example, Buechler contended:

As a group, the schools serve a student population comparable to the overall public school population in terms of race and socioeconomic status—not an elite population of upper-middle-class white students, as some had feared. Indeed, many charter schools have been designed explicitly to serve . . . a more underprivileged student population than regular public schools do.<sup>187</sup>

This conclusion may be misleading, however, because individual charter schools might be highly divergent in terms of stratification from their school districts and, equally significant, local neighborhood schools.<sup>188</sup> As I have demonstrated in the previous subsection, even if generally accurate, such a conclusion does not necessarily connote that the student composition of New Jersey charter schools mirrors similar results.<sup>189</sup>

More importantly, several studies of individual states have provided specific indications of segregation. For example, a study of Texas charter schools found evidence of “ethnic clustering” and “[a]cute cases of racial . . . distinctiveness” based on the fact that at least 90% of the student population in nine of seventeen charter schools consisted of a particular racial or ethnic minority.<sup>190</sup> A study of Arizona charter schools found

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<sup>186</sup> See, e.g., M. Buechler, *Charter Schools: Legislation and Results after Four Years*, Bloomington, Indiana: School of Education Office 26–27 (1996).

<sup>187</sup> See *id.*

<sup>188</sup> See Casey D. Cobb & Gene V. Glass, *Ethnic Segregation in Arizona Charter Schools*, 7 EDUC. POL'Y ANALYSIS ARCHIVES 1–39 (Jan. 14, 1999), at <http://epaa.asu.edu/epaa/v7n1/> (last visited Mar. 20, 2004).

<sup>189</sup> See *supra* Part III.A.1.

<sup>190</sup> Delbert Taebel et. al, *Texas Open-Enrollment Charter Schools: Year One Evaluation*, Austin, Texas: Texas State Board of Education, 16, 85 (Dec. 1997),

“subtle exclusionary practices,” due in part to the utilization of waiting lists, a process that “occurs in a vacuum, and applies only to those who choose to be on them.”<sup>191</sup> Additionally, in a nationwide USDOE study that found no explicit discrimination, the researchers felt obliged to caution that “more subtle processes of selecting students, however, may be at work.”<sup>192</sup> Thus, at the least, these studies provide warnings that states have not completely succeeded in preventing discriminatory practices in their charter school programs.<sup>193</sup>

### *B. Problem Areas Identified in Case Law*

#### 1. Indications in New Jersey Case Law

New Jersey’s courts have exhibited a strong tendency to support the state’s charter school program.<sup>194</sup> Almost all of the State’s appellate division and supreme court decisions have ruled in favor of charter schools against challenges brought by

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available at [http://www.tcer.org/tcer/schools/yr1\\_report.doc](http://www.tcer.org/tcer/schools/yr1_report.doc) (last visited Mar. 20, 2004).

<sup>191</sup> Cobb & Glass, *supra* note 188, at 29. The authors of this study make a noteworthy assertion:

The ethnic separation on the part of Arizona’s charter schools, though de facto, is an insidious by-product of unregulated school choice. If parents can choose where to send their children to school, they are likely to choose schools with students of similar orientations to their own. Moreover, it is well documented that choosers (in this case, charter students and parents) differ from non-choosers in several meaningful ways, which further contributes to the stratification of students along ethnic and socioeconomic lines.

*Id.*

<sup>192</sup> OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEP’T OF EDUC., A STUDY OF CHARTER SCHOOLS 47 (1997). The USDOE researchers suggested that they would have to undertake more field research to probe deeper into the selection process. “For example, we will want to ask, in situations where it is possible, whether charter schools actively seek out students from diverse ethnic or racial backgrounds.” *Id.*

<sup>193</sup> Although the failure to recruit a more representative student composition may not be legally discriminatory (except perhaps with respect to students with disabilities), a reluctance on the part of charter schools to ensure that the families of historically disadvantaged students are sufficiently informed about the advantages of their schools—with the result that other students receive greater educational opportunities—appears to at least impede the *goals* of federal and state laws designed to assist historically disadvantaged students.

<sup>194</sup> See Robert J. Martin, A Regulatory Analysis, Case Law Analysis, and Limited Program Review of New Jersey’s Charter School Program 171 (2003) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

school districts contesting the opening or continued operation of such schools.<sup>195</sup> In the relatively small number of cases that raised claims of alleged discrimination, the state courts typically held that there was insufficient evidence to establish that charter schools engaged in discriminatory practices or created a discriminatory impact on their local school districts.<sup>196</sup>

Nevertheless, in its most far-reaching decision, *In re Englewood on the Palisades Charter School*, the New Jersey Supreme Court expressed concern that certain charter schools might produce discriminatory effects.<sup>197</sup> In that case, the court upheld a lower court decision that determined a local school board failed to identify any particular infringement to African-American students residing in the school district.<sup>198</sup> The New Jersey Supreme Court, however, felt compelled to issue protective instructions to the Commissioner of Education, requiring him to take future steps to ensure that the charter school—and all other charter schools—did not cause discrimination.<sup>199</sup>

In its administrative decisions, the State Board of Education also demonstrated a strong willingness to support New Jersey's charter school program.<sup>200</sup> Like the state supreme court, however, the State Board has expressed concern that certain

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<sup>195</sup> *Id.* at 171–72.

<sup>196</sup> *Id.* at 173; *see, e.g., In re Greater Brunswick Charter Sch.*, 753 A.2d 1155, 1163–64 (N.J. Super. Ct. App. Div. 1999) (stating that it is too early to determine if the charter school will have a discriminatory impact).

<sup>197</sup> *In re Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 691 (N.J. 2000).

<sup>198</sup> *Id.* at 689. It is worth noting that the court did not find violations of two of the constitutional provisions that I have previously identified as possible sources for plaintiffs to pursue in combating discriminatory practices. Specifically, the court found no violation of the state constitution's equal protection provision (Art. 1, ¶ 1) and the provision that guarantees that students will not be segregated because of their race. (Art. 1, ¶ 5). *Id.* at 692, 694; *see also supra* Part II.B.

<sup>199</sup> *In re Englewood*, 753 A.2d at 694–95. In its determination to issue instructive guidelines, the New Jersey Supreme Court may have been motivated by the long history of segregation associated with the local high school, Dwight Morrow, which had resulted in more than a decade of litigation involving three school districts: Englewood, Englewood Cliffs and Tenafly. In the most recent decision concerning these litigants, the court ruled that the State Board of Education bears the ultimate responsibility to develop and implement a plan to achieve appropriate racial balance and educational quality at the local high school. *See Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Ed.*, 788 A.2d 729, 745 (N.J. 2002).

<sup>200</sup> Martin, *supra* note 194, at 211–12.

New Jersey charter schools might engage in discriminatory practices or exacerbate segregation in local school districts.<sup>201</sup> In one of its cases, the State Board denied an application specifically because a proposed charter school had exhibited a discriminatory admissions policy.<sup>202</sup> In other cases, the State Board—as did the state supreme court—felt compelled to issue protective instructions to the Commissioner of Education prior to granting final charter approval. For example, the State Board required the Commissioner to investigate one school's racial composition,<sup>203</sup> to assess another school's admissions policies,<sup>204</sup> and to make certain that a third school carried through with its plan of promoting racial balance.<sup>205</sup>

As evidenced by their need to issue protective instructions, the New Jersey Supreme Court and State Board indicated that, unless carefully supervised, some New Jersey charter schools may not adequately serve and protect the needs of historically disadvantaged students. In the view of both the court and the Board, the Commissioner of Education must closely monitor New Jersey's charter school program to ensure that none of the state's charter schools engage in discriminatory actions. The Commissioner is obligated to conduct an annual review of each charter school to preclude such actions from occurring or continuing.<sup>206</sup> Because of fiscal and other administrative problems that have strained NJDOE's resources, however, the Commissioner may find it difficult to perform a thorough examination.<sup>207</sup>

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<sup>201</sup> *Id.*

<sup>202</sup> *See In re Ernest L. Boyer Charter Sch.*, S.B. No. 12-98 (N.J. Bd. of Educ. Jan. 21, 1998). In denying the application, the Board did not provide any details, other than indicating that the proposed charter school had evidenced an intention to admit a disproportionate amount of students of one particular race. *See id.*

<sup>203</sup> *See In re Academy Charter High Sch.*, S.B. No. 22-98 (N.J. Bd. of Educ. Jan. 21, 1998).

<sup>204</sup> *See In re Ocean City Charter Technical High Sch.*, S.B. No. 16-98 (Jan. 21, 1998).

<sup>205</sup> *See In re Patrick Douglas Charter Sch.*, S.B. No. 25-98 (N. J. Bd. of Educ. Jan. 21, 1998).

<sup>206</sup> For an explanation of the Commissioner's supervisory obligations, see text accompanying notes 250–54, *infra*.

<sup>207</sup> The amount of NJDOE staff supervising the charter school program has decreased during the last two years; the NJDOE attributes this development to the state's budgetary crisis.

## 2. Indications in Case Law Outside of New Jersey

Similar to the courts in New Jersey, the federal and state courts in other states consistently display a strong tendency to support the charter school programs in their respective states.<sup>208</sup> As in New Jersey, in almost all of the out-of-state cases that raised claims of alleged discrimination, the courts typically ruled that there was insufficient evidence to establish that charter schools had engaged in discriminatory practices.<sup>209</sup> Moreover, in the most highly publicized state court case, *Beaufort County Board of Education v. Lighthouse Charter School Committee*, the South Carolina Supreme Court ultimately became more concerned about how the charter school's admission policy might have resulted in *reverse* discrimination, as opposed to how it might negatively have impacted African-American students, who comprise approximately 50% of the local school district's population.<sup>210</sup>

Even though the representatives of historically disadvantaged students usually could not prove discrimination, their challenges at least provided some signals that certain charter schools might induce discriminatory racial effects. In *Villanueva v. Carere*, the federal circuit court of appeals lent credence to that possibility, declaring that "[w]e share the Parents' concern with the practice of drawing classifications based on 'culture,' which might in some circumstances be used as a proxy for ethnicity, race, national origin or some other suspect classification."<sup>211</sup> In the federal district decision of *Berry v.*

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<sup>208</sup> See e.g., Martin, *supra* note 194, at 213.

<sup>209</sup> *Id.*

<sup>210</sup> See *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 516 S.E.2d 655, 659–60 (S.C. 1999). *But see* *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 576 S.E.2d 180, 182 (S.C. 2003) (dismissing as moot the constitutional challenge to the Charter Schools Act of 1996, given the 2002 revision to the Act).

<sup>211</sup> 85 F.3d 481, 488 (10th Cir. 1996). By using the term "culture," the circuit court was specifically referring to a means of engendering racial segregation. Despite its concern, the court determined that the Latino parents had failed to establish an equal protection or Title VI violation in their challenge to the opening of a charter school. *Id.* at 486–87. The court, however, did not specifically address and only alluded to the more subtle issue of whether charter schools may promote certain distinctive themes, such as Asian studies, black history and Western Europe Civilization, and by so doing indirectly encourage or discourage students of particular races and ethnic groups to seek admission. New Jersey does not permit its charter schools to establish programmatic themes geared toward attracting identifiable races and ethnic groups. *Cf. infra* text accompanying note 257

*School District of City of Benton Harbor*,<sup>212</sup> the court demonstrated an even stronger concern about potential discriminatory practices, ordering a charter school to produce in advance a list of the students planning to attend the school to determine whether the school's racial balance was proportionally representative to that of the local school district.<sup>213</sup>

Although such cases have provided some indication of potential charter school discrimination against historically disadvantaged students, they do not necessarily reflect the extent and scope of these practices. Whether "problem" charter schools identified in litigation constitute an isolated few or represent a larger cohort remains unclear. Additionally, each of the small number of identified cases has dealt only with alleged discrimination on account of race, ethnicity or socioeconomic status. No case has involved students with disabilities or limited English proficiency, even though at least one study has singled out such students as experiencing the greatest difficulty in obtaining equal opportunities from individual charter schools.<sup>214</sup> Hence, the absence of litigation is not necessarily conclusive. It could simply mean that many representatives of students with disabilities and limited English proficiency have chosen not to proceed with the complicated and time-consuming process of litigation as a way of pursuing equal opportunities at charter schools. Therefore, one should look at additional sources to gain a more accurate measure of the extent to which charter schools may have failed to meet the goal of providing equal opportunities for historically disadvantaged students.

### C. *Problem Areas Identified in Office of Civil Rights Complaints*

In addition to state and national studies and litigation, another means of gauging the scope of discriminatory practices occurring in charter schools can be derived from an examination of the number and nature of complaints filed with state and federal agencies. Unfortunately, many states such as New

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(discussing the ban on programmatic themes geared towards gender). Nevertheless, without effective oversight, it is conceivable that charter schools could intentionally or unintentionally design or orientate their programs to affect the degree of participation of certain groups.

<sup>212</sup> 56 F. Supp. 2d 866, 885 (W.D. Mich. 1999).

<sup>213</sup> *Id.*

<sup>214</sup> *See infra* Part IV.D.

Jersey have not kept comprehensive and updated lists of complaints filed in their central office or in regional or county offices. A more reliable source for obtaining such information is the USDOE Office of Civil Rights (OCR). Pursuant to my request, the OCR was able to furnish me with data concerning complaints about charter schools filed from 1998 through 2002, the first five years in which New Jersey charter schools operated.<sup>215</sup>

Using computer-generated information, the OCR identified the charter school complaints it received by both state and type.<sup>216</sup> The types of complaints were divided on the basis of applicable federal laws: Title VI for complaints relating to race; Title IX for complaints relating to gender; section 504 for complaints relating to students with disabilities; and "Multi" for complaints involving more than one of the three types. Nationwide, the OCR received the following complaints:

OCR CHARTER SCHOOL COMPLAINTS: 1998–2002:

| YEAR | TITLE VI | TITLE IX | SEC. 504 | MULTI            |
|------|----------|----------|----------|------------------|
| 1998 | 0        | 0        | 9        | 0                |
| 1999 | 3        | 0        | 11       | 4 <sup>217</sup> |
| 2000 | 6        | 0        | 26       | 3 <sup>218</sup> |
| 2001 | 6        | 0        | 23       | 4 <sup>219</sup> |
| 2002 | 5        | 1        | 35       | 8 <sup>220</sup> |

<sup>215</sup> I received this information in a January 16, 2003 memorandum prepared by Thomas Hibino. For privacy reasons, the OCR was unable to provide details of the individual complaints, many of which are still pending. See Memorandum from Thomas Hibino, U.S. Dep't of Educ., Office of Civil Rights (Jan. 16, 2003) (on file with author).

<sup>216</sup> Mr. Hibino, the official responsible for generating the data, noted that "it's accurate, but may not be perfect, [because] prior to 2002, there wasn't a unique code for charter schools, so we searched for schools with 'charter' in the name, which might include a few false positives." *Id.*

<sup>217</sup> The Multi complaints in 1999 consisted of four complaints involving Title VI and section 504. *Id.*

<sup>218</sup> The Multi complaints in 2000 consisted of two complaints involving Title VI and Title IX, and one complaint involving Title IX and section 504. *Id.*

<sup>219</sup> The Multi complaints in 2001 consisted of two complaints involving Title VI and section 504, and two complaints involving other issues. *Id.*

<sup>220</sup> The Multi complaints in 2002 consisted of two complaints involving Title VI and section 504, two complaints involving Title VI and Title IX, one complaint involving Title VI, Title IX, and section 504, and three complaints involving other issues. *Id.*

Separating the issues of the Multi complaints and including them as part of the count of the other three categories, the nationwide calculation translates to:

| YEAR | TITLE VI | TITLE IX | SEC. 504 | TOTAL CASES |
|------|----------|----------|----------|-------------|
| 1998 | 0        | 0        | 9        | 9           |
| 1999 | 7        | 0        | 15       | 18          |
| 2000 | 8        | 3        | 27       | 35          |
| 2001 | 8        | 0        | 24       | 33          |
| 2002 | 10       | 4        | 38       | 49          |

One should note that the total number of cases is less than the sum of the three categories in years 1999 through 2002 because the Multi cases contain more than one issue and have, therefore, been double-counted.

In determining the states in which the complaints were filed, the OCR data revealed that *none* of the 144 cases from 1998 through 2002 were filed against New Jersey charter schools.<sup>221</sup> This seems surprising since New Jersey has produced more charter school litigation than any other state,<sup>222</sup> and many practices of its charter schools pertaining to historically disadvantaged students have been called into question as indicated by state and national studies and in-state litigation.<sup>223</sup> The fact that most of the nationwide OCR complaints have originated in states with older and larger charter school programs suggests that New Jersey's void may be due, at least in part, to a lack of awareness about this means of voicing disapproval over charter school treatment.<sup>224</sup> As New Jersey's charter school program expands and becomes more established, however, it seems likely that some representatives of historically disadvantaged students may exercise their right to file OCR complaints against charter schools.

The nationwide figures of OCR complaints, used as a general indicator of potential problem areas, demonstrate that

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<sup>221</sup> *See id.* In fact, with the exception of one "undetermined" complaint filed in 2002, *none* of the 144 complaints were filed in Region II, which is comprised of several Mid-Atlantic states including New Jersey.

<sup>222</sup> Martin, *supra* note 194, at 216–17.

<sup>223</sup> *See supra* Part III.B.1.

<sup>224</sup> *See* Martin, *supra* note 194, at 217.

most of the filings have involved alleged discriminatory practices against students with disabilities.<sup>225</sup> Of the 144 complaints filed from 1998 through 2002, 113—or more than 78%—have involved alleged section 504 violations.<sup>226</sup> This percentage stands in marked contrast to the amount disclosed in my research investigating challenges pursued by means of litigation, which indicates that during this same time period *no* cases against charter schools have been brought on behalf of students with disabilities. The OCR data thus appears to corroborate the assertion that some charter schools indeed may not have been meeting the requirements, let alone the goals, of federal disability law.<sup>227</sup>

Of course, OCR findings—as opposed to mere complaints—of discriminatory practices would provide much more conclusive corroboration. Although the extent of confirmed violations has not been made public, at least one well-publicized OCR finding reveals the manner in which certain charter schools may not have fulfilled their obligations pertaining to students with disabilities.<sup>228</sup> The complaint involved the Boston Renaissance Charter School's treatment of a kindergarten student who had exhibited behavioral difficulties.<sup>229</sup> The school suspended the student and later recommended that he be evaluated for eligibility of IDEA services.<sup>230</sup> Although it was determined that the child did not meet IDEA qualifications, he did meet section 504's functional definition of a disabled child because of his hyperactivity and possible Attention Deficit Hyperactivity Disorder (ADHD).<sup>231</sup> Nevertheless, the school continued to suspend the student frequently and restrict his attendance to one-half of the school day.<sup>232</sup>

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<sup>225</sup> *See id.*

<sup>226</sup> One should also not overlook the substantial number of complaints dealing with potential racial discrimination, since 33 of the 144 complaints—or 23%—involved alleged violations of Title VI. *See* Memorandum from Thomas Hibino, *supra* note 215.

<sup>227</sup> *See supra* Part II.A.

<sup>228</sup> *See* Mead, *supra* note 94, at 170–72.

<sup>229</sup> *See* Vicki M. Pitasky & Patricia Grzywacz eds., *Boston (MA) Renaissance Charter Sch.*, 26 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 889 (1997).

<sup>230</sup> *Id.* at 890.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* It is worth noting that while he was in first grade, the child's parents transferred him to a traditional public school, where he reportedly completed the year successfully without the need for disciplinary action or early dismissal.

In evaluating the charter school's actions for possible section 504 violations, the OCR ruled that the school had violated both procedural and substantive rights.<sup>233</sup> Regarding procedural violations, the OCR found that the school had not adopted or disseminated proper notices of non-discrimination on the basis of disability; had failed to designate a staff member to receive grievances and to investigate and resolve complaints; had neglected to inform the parents of their rights, including the right to file a complaint and to request an impartial hearing; and had failed to explain the safeguards provided by law for students facing suspension.<sup>234</sup> Regarding substantive rights, the OCR found that the school had violated the student's rights to a free and appropriate education in two ways: (1) the school had failed to provide supplementary aids and services within the regular classroom; and (2) it had wrongfully reduced the length of the student's school day.<sup>235</sup> The OCR determined that the school must provide students with disabilities access to the same length of school day as other students unless, due to the nature and severity of the disabilities, a shortened day is deemed more appropriate.<sup>236</sup>

It seems quite conceivable that New Jersey charter schools may commit violations similar to those committed by the Boston Renaissance Charter School. Simply because no one has yet filed a complaint—or brought a lawsuit or conducted a thorough school-by-school investigation—does not mean that New Jersey's charter schools have been fulfilling all of their obligations toward historically disadvantaged students. Although OCR's publicized out-of-state decisions and nationwide data provide a mere inference of possible infractions within New Jersey, they do provide an indication—especially when combined with the previously discussed state and national studies and litigation—that New Jersey's charter schools may not be doing all they possibly can to further the goals of state and federal law designed to promote equal educational opportunity for historically disadvantaged students.

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 892. Because of the violations, the Boston Renaissance Charter School agreed to a settlement, obligating it to make changes in policy and staff training. The school also agreed to reimburse the student's parents for childcare and tutorial expenses they had incurred during the period of his enrollment. *Id.*

#### IV. RECOMMENDATIONS FOR ENHANCING CHARTER SCHOOL ACCESSIBILITY FOR HISTORICALLY DISADVANTAGED STUDENTS

In making recommendations for enhancing accessibility to New Jersey charter schools for historically disadvantaged students, I have concentrated primarily on the *goals* rather than the requirements of state and federal law designed to promote equal educational opportunity for historically disadvantaged students. As can be gleaned from previous discussion, the precise extent to which New Jersey's charter school program has adhered to all of the requirements of federal and state anti-discrimination and civil rights laws remains uncertain. As I have emphasized, however, there are certainly indications that New Jersey may not be doing as well as it could be or should be doing to fulfill the goals of those laws.<sup>237</sup>

By recommending ways—outside of litigation strategies—to make New Jersey's charter school program more responsive to historically disadvantaged students, I am following the advice of Martha Minow.<sup>238</sup> Even though Minow has defended the continued use of court-based challenges to advance the opportunities of at-risk students, she has also acknowledged that judicial decisions are often not the best means of accomplishing that objective because they may be too remote, distinguishable, and unpredictable.<sup>239</sup> Instead, she has suggested that state policymakers should strive to make certain that their charter school program's regulatory scheme includes appropriate restrictions and guidelines.<sup>240</sup>

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<sup>237</sup> There is also another important indication that New Jersey's charter schools have not been providing the level of programmatic quality that state policymakers had anticipated. In *Charter Schools Fail the Test* the editors criticize the poor performance of charter school students—particularly in special needs districts—on the state-mandated fourth and eighth grade tests. I have not discussed this topic of programmatic quality here because it is outside the scope of this Article. See Editorial, *Charter Schools Fail the Test*, STAR LEDGER, Jan. 20, 2002, available at 2002 WL 10907599.

<sup>238</sup> See Minow, *supra* note 8.

<sup>239</sup> *Id.* at 284.

<sup>240</sup> Another education law scholar, Stuart Biegel, observed shortly after the charter school movement began its rapid expansion that state policymakers must take the time to develop “quiet and thoughtful approaches” in the design of their charter school programs. See Biegel, *supra* note 13, at 1584. Such approaches, he asserted, would make more of a difference in children's lives than efforts of enforcement by means of litigation. *Id.* at 1583–84.

Through my recommendations, I have attempted to provide worthwhile ways of meeting those concerns as they apply to New Jersey. For ease of discussion, I have separated the recommendations according to specific groups of historically disadvantaged students: students of racial and ethnic minorities and low-income status, students based on gender, students with disabilities, and students with limited English proficiency. I have concluded with recommendations designed to strengthen the oversight and accountability of the NJDOE in order to increase its capacity and responsibility to ensure that charter schools fulfill their obligations to historically disadvantaged students.

A. *Recommendations Regarding Students of Racial and Ethnic Minorities and of Low Economic Status*

Based on the indicators previously discussed, it appears that some New Jersey charter schools are not complying fully with the statutory provision regarding admission policies and procedures.<sup>241</sup> That provision obligates charter schools “to the maximum extent practicable, [to] seek the enrollment of a cross section of the community’s school age population including racial and academic factors.”<sup>242</sup> By inserting this provision into the charter school enabling act, the New Jersey legislature presumably signaled its intention to require each charter school to take affirmative steps to include a proportional representation of students of racial and ethnic minorities and low economic status. In evaluating the adequacy of a charter school’s efforts to meet that standard, I do not think it sufficient to use as a standard the racial and ethnic composition and income level of the local neighborhood, which, due to clustering and economic stratification, may have become highly segregated.<sup>243</sup> Like

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<sup>241</sup> See *supra* Part IV.A.1.

<sup>242</sup> N.J. STAT. ANN. § 18A:36A-8e (West 1995).

<sup>243</sup> As previously noted, there are indications that certain charter schools also may not be reflective of the racial composition of their local neighborhood schools. For example, the Liberty Charter School in Jersey City reported its racial composition as black 73.7%, white 0%, Hispanic 27.7%, and Asian 1.1%; whereas, the closest elementary school (with the same grades), Jersey City School #16, reported its racial composition as black 32.8%, white 15%, Hispanic 29.3%, and Asian 22.8%. Although this example may prove to be an anomaly, I am unable to draw firm conclusions because neither the NJDOE nor local school districts have been able to provide a racial breakdown of nearby public schools with which to make statistical comparisons with individual charter schools. The NJDOE should

magnet and other specialty schools, charter schools have an obligation to serve and represent all segments of the community in which they are located.<sup>244</sup> To the extent that a charter school may enroll a disproportionately higher percentage of one historically disadvantaged group of students that happens to reside in the neighborhood, it may be denying educational opportunities for other disadvantaged groups residing throughout the community. Moreover, it may also be denying its own students the general advantages of a more diversified student enrollment.

Therefore, as proposed by Levin,<sup>245</sup> I recommend that the state take stronger proactive measures to make certain that every charter school undertakes a conscientious effort to achieve a true cross section of its district's student population.<sup>246</sup> Charter schools should not be exempt from this obligation merely because they have no immediate openings and possess student waiting lists. The NJDOE must conduct an annual review of the racial, ethnic and economic status of the student composition of each of its charter schools<sup>247</sup> and proscribe corrective action on an as-needed basis. Because the NJDOE ultimately determines whether to grant renewal of a school's charter,<sup>248</sup> it certainly possesses the capacity to persuade individual charter schools to take more aggressive action, if necessary, to achieve a more representative cross section of the community. The NJDOE should also forbid charter schools from requiring parents to contribute either time or money, so as to prevent less able or willing parents from denying their children educational opportunities because of parental circumstances.<sup>249</sup>

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undertake this analysis for each of the state's charter schools, and that task is included as one of my recommendations pertaining to racial and ethnic minorities.

<sup>244</sup> See *id.* § 18A:36A-8(a).

<sup>245</sup> Levin, *supra* note 7, at 286–91.

<sup>246</sup> As previously discussed, see *supra* note 84, the state cannot simply mandate quotas that would require charter schools to enroll a desired percentage of students of a racial or ethnic group. The courts would probably construe such a policy as unconstitutional.

<sup>247</sup> Although it cannot probe into the financial circumstances of students' families, the NJDOE can use—as it does now—the criteria for eligibility in the federal free and reduced lunch program as a reasonable surrogate for determining the percentage of students who fall within the range of economically disadvantaged.

<sup>248</sup> See N.J. STAT. ANN. § 18A:36A-17.

<sup>249</sup> As an alternative to prohibiting the payment of any required fees, Biegel, *supra* note 13, at 1582, has proposed that schools adopt a sliding scale based on the ability of parents to pay. Although this proposal has some appeal, it seems to run

I further recommend that the NJDOE take affirmative steps to ensure that the establishment and continued operation of charter schools does not result in a negative discriminatory impact on local school districts. The most obvious way to accomplish this objective is to require the Commissioner to carry out carefully and consistently the New Jersey Supreme Court's instructions set forth in *In re Englewood on the Palisades Charter School*.<sup>250</sup> In that case, the court directed the Commissioner to make an annual assessment to determine the racial impact of a proposed or existing charter school on the local district(s).<sup>251</sup> It also directed the Commissioner to assess the economic impact of a proposed or existing charter school in those instances in which a school district has made a preliminary demonstration that the impact might impede its ability to provide a T & E education to all of its students.<sup>252</sup> Such an assessment seems especially appropriate for certain charter schools, such as the Englewood on the Palisades Charter School, the Red Bank Charter School, and the Unity Charter School of Morristown, that are situated in local school districts where the district itself has displayed a past pattern of racial segregation.<sup>253</sup> Without ongoing departmental oversight, some charter school officials might become less mindful that all students are entitled to equal educational opportunities or that they—and not just officials of the local school district—have a direct responsibility to provide adequate resources. Should the NJDOE determine that specific charter schools are causing a

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contrary to the notion that charter schools are public schools and, as such, should be funded by the general public rather than direct users of the program.

<sup>250</sup> 753 A.2d 687, 694 (N.J. 2000).

<sup>251</sup> *Id.*

<sup>252</sup> In apparent response to the New Jersey Supreme Court's directives, the NJDOE has promulgated a revised regulation requiring the Commissioner to assess annually the composition of each charter school to determine "the segregative effect that the loss of the students may have on its district of residence." See N.J. ADMIN. CODE tit. 6A, § 11-2.2(c) (2000). If the NJDOE ensures that the Commissioner complies, it will then have fulfilled the preliminary step of my previous recommendation (i.e., that the NJDOE take proactive measures to make certain that all charter schools make substantial a effort to enroll a true cross section of the local district's student population).

<sup>253</sup> All of these charter schools were the subjects of lawsuits. See *In re Englewood on the Palisades Charter Sch.*, 727 A.2d 15, 29 (N.J. Super. Ct. App. Div. 1999), *aff'd as modified by* 753 A.2d 687 (N.J. 2000); *In re Unity Charter Sch.*, No. A-6212-98T1 (N.J. Super. Ct. App. Div. July 13, 2000); *In re Red Bank Charter Sch. Ass'n*, No. A-4725-97T1 (N.J. Super. Ct. App. Div. May 17, 1999).

serious impediment to the well-being of a local district, it must then engage in the difficult but necessary process of implementing strategies to counteract or mitigate identified problems.<sup>254</sup>

*B. Recommendations Regarding Students Based on Gender*

Despite the concern that several legal commentators have raised about the potential of gender-based discrimination in individual charter schools,<sup>255</sup> I have found no evidence of such practices within New Jersey's charter school program.<sup>256</sup> New Jersey's regulatory scheme does not permit single-sex schools and does not permit programmatic themes that would inherently appeal to one gender more than the other.<sup>257</sup> Data received from the NJDOE discloses that most charter schools have enrolled approximately the same percentage of male and female students.<sup>258</sup> In 1999–2000, more than 80% of the charter schools reported that their enrollment deviated no more than 10% by gender.<sup>259</sup> With but one exception, all charter schools contained at least 43% males and at least 40% females.<sup>260</sup> Furthermore, New Jersey case law has not exposed any gender-based problems.<sup>261</sup> Consequently, I find no need to make any recommendations concerning this issue, since in this respect New Jersey's charter school program appears to be operating satisfactorily.

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<sup>254</sup> If, for example, the NJDOE determines that a charter school is draining too much money from a local district, it could authorize additional funding to that district. If the NJDOE determines that a charter school is creating a disproportionate racial impact on the local school district, it could direct the charter school to initiate more intense and expanded recruitments practices in order to obtain a more representative cross section of the district's student population. As an alternative means of combating discriminatory impacts, the NJDOE could consider implementing one of Martha Minow's more noteworthy suggestions. Minow has suggested that when segregation occurs by design or by a pattern of self-selection in individual charter schools, the state should attempt to mitigate it by requiring the school to participate in a district or regional program that intermixes students from different schools. *See* Minow, *supra* note 8, at 285.

<sup>255</sup> *See, e.g., id.* at 269; *see also* Levin, *supra* note 7.

<sup>256</sup> *See supra* Part IV.A.1.

<sup>257</sup> *See* N.J. STAT. ANN. § 18A:36A–7 (West 1999).

<sup>258</sup> *See* discussion of appendix C, *supra* Part IV.A.1.

<sup>259</sup> *See infra* app. C.

<sup>260</sup> *See infra* app. C. The sole exception was Sussex County Charter School with 38.5% female students.

<sup>261</sup> *See* Martin, *supra* note 194, at 224.

*C. Recommendations Regarding Students with Disabilities*

As previously demonstrated, a large majority of New Jersey charter schools may not be making an adequate effort to recruit and serve students with disabilities.<sup>262</sup> If so, they have violated both state and federal law.<sup>263</sup> Since the NJDOE Commissioner has conceded that he has not fully investigated the matter,<sup>264</sup> my first recommendation is that the NJDOE should conduct a rigorous, school-by-school investigation. In performing this task the NJDOE should attempt to ascertain whether the disproportionately lower percentage of students with disabilities enrolled in charter schools may be traced to discriminatory practices, either intentional or inadvertent. The investigation needs to examine many factors, including the types of students with disabilities who have or have not chosen to enroll in certain charter schools and the alternative choice of programs that may be available to such students in the local district.<sup>265</sup> Perhaps the lower percentage may be largely due to a belief on the part of students with disabilities and their families that they are better served in the local school district.<sup>266</sup> If, however, the NJDOE

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<sup>262</sup> The most recent data indicated that, as of 1999–2000, almost two-thirds of New Jersey’s charter schools had enrolled a lower percentage of students with disabilities than their respective school districts. *See* app. D.

<sup>263</sup> It must be recognized that some of the recruiting and identification problems may be directly attributable to a shortage of adequate resources—including staff, facilities, and services—resulting from the limited amount of funding that the state allocates to charter schools. Most studies of New Jersey’s charter school program, including those performed by the NJDOE, have concluded that the biggest problem that the charter schools encounter is an overall lack of funding. Unlike most states, which provide charter schools with fully equalized funding, New Jersey authorizes its charter school to receive only ninety percent of the per pupil funding that local school districts spend. Several commentators, such as Betsy Levin, *supra* note 7, at 290–91, have cautioned that charter schools must receive full equality of resources if they are to adequately serve their students’ needs. This is especially true for students with disabilities, who typically place more demands on resources than other students. Therefore, with respect to students with disabilities, New Jersey should revise its funding formula for charter schools to provide one hundred percent, per-pupil funding and ensure that such students receive full funding for additional services as identified in their individualized education plan.

<sup>264</sup> HESPE, *supra* note 141, at 3–4.

<sup>265</sup> The NJDOE should examine the types of students with disabilities that individual charter schools are enrolling as a means of precluding schools from seeking to admit only students with less severe disabilities.

<sup>266</sup> Although such a finding may allow charter schools to avoid culpability, it does not necessary comply with the *goals* of disability law. Perhaps with greater resources, a charter school would be able to offer a more enriched educational

determines that particular charter schools have not been reasonably assertive in accommodating students with disabilities, it should use its inherent powers of charter revocation and renewal to instill more satisfactory compliance.<sup>267</sup>

Moreover, the NJDOE should develop specific strategies to try to counteract the perceived reluctance of some charter schools to enroll and adequately assist students with disabilities. I recommend that the NJDOE employ adaptations of Jay Heubert's proposed measures.<sup>268</sup> Thus, the NJDOE should attempt to initiate clustering and inter-district cooperative arrangements for students with disabilities enrolled in charter schools within the same school district, assuming that the programs are mutually compatible.<sup>269</sup> This type of mutual assistance would be particularly useful in the state's two largest school districts: Newark, which presently contains ten charter schools, and Jersey City, which presently contains nine charter schools. In those instances where cooperative arrangements would be unworkable or unavailable, the NJDOE could still seek to persuade charter schools to reduce costs and time-consuming tasks by sharing special education specialists on a part-time basis.<sup>270</sup> Additionally, the NJDOE could direct more isolated charter schools to utilize the special education resources of their local school districts.<sup>271</sup> And if, as previously suggested, the NJDOE were to open a central school support center,<sup>272</sup> it could authorize that center to monitor the activities of individual charter schools and issue advice and technical assistance on how to comply with complex special education requirements of the IDEA, section 504, and the ADA.<sup>273</sup>

Such actions could make a significant difference in the lives of students with disabilities. It is worth reemphasizing Heubert's observation that students with disabilities stand to

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program for students with disabilities, who might then conclude that the charter school's learning environment could better serve the students' needs than that of a traditional public school.

<sup>267</sup> If, for example, a charter school failed to comply with IDEA requirements, that failure would provide sufficient grounds for the NJDOE to revoke the school's charter or bar its renewal after the initial four-year term.

<sup>268</sup> Heubert, *supra* note 7, at 348-51.

<sup>269</sup> *Id.* at 340.

<sup>270</sup> *See id.* at 349.

<sup>271</sup> *See id.*

<sup>272</sup> *See supra* note 58 and accompanying text.

<sup>273</sup> *See discussion supra* Part II.A.

gain at least as much from the potential advantages of charter schools as non-disabled students.<sup>274</sup> With their typically small class sizes and innovative techniques, charter schools could help reduce the number of students who might otherwise remain dependent on the special education programs of traditional schools, which frequently suffer from highly bureaucratic and formal systems of referral, evaluation, and placement. Given the right setting and proper attention, many students with disabilities might truly blossom, and thereby make the most of the charter school experience. Charter schools might then provide a valuable pedagogical model for traditional public schools by demonstrating how to serve students with disabilities without the typical cumbersome bureaucracy.

*D. Recommendations Regarding Students with Limited English Proficiency*

As has been the case with students with disabilities, students with limited English proficiency (LEP) have not been proportionately represented at New Jersey charter schools.<sup>275</sup> Based on the NJDOE's 1999–2000 study, LEP students have been the least represented of any group of historically disadvantaged students. Most strikingly, over three-quarters of the state's charter schools reported enrolling *no* LEP students, even though many of these schools were located in districts in which LEP students comprised at least 10% of the student population. Similar to the situation affecting students with disabilities, the NJDOE Commissioner has not yet been able to provide a research-based explanation for this disparity.<sup>276</sup>

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<sup>274</sup> Heubert, *supra* note 7, at 348.

<sup>275</sup> *See infra* app. E.

<sup>276</sup> It may be contended that charter schools are usually not prepared and cannot be expected to address the various language needs of LEP students. Nevertheless, it appears that under federal case law charter schools, as LEAs, may have to assume that obligation. *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (“It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondent’s school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations.”). It would be especially incumbent upon those in districts with large concentrations of students whose families speak a particular foreign language, as in New Jersey’s many Latino neighborhoods. To assist them, the NJDOE could initiate some of the strategies proposed in the previous section for students with disabilities, such as clustering and inter-district cooperative arrangements. *See supra* Part IV.C.

Accordingly, my first recommendation is that the NJDOE conduct a thorough investigation as to why LEP students have experienced such severe underrepresentation. The disparity is especially troubling in that many LEP students are probably also members of other groups of historically disadvantaged students due to their race, ethnicity, and economic status. Hence, the NJDOE investigation should take into account these other criteria and should also consider whether the geographic placement of charter schools has developed in a way that has discouraged LEP students from seeking to attend such schools.

Additionally, I recommend that the NJDOE adopt a proposal that legal commentators indicate will help all historically disadvantaged students, especially LEP students. Both Huffman and Biegel have proposed that states establish "parent information centers" to facilitate more communication about charter schools to parents of all eligible students.<sup>277</sup> The centers would be particularly useful to LEP families who may have had less chance to obtain and understand materials that describe the asserted benefits of local charter schools. The information centers should therefore be placed in locations where immigrant and other LEP families would have ready access and be staffed by persons with multi-language skills, as appropriate for those particular locations.

Finally, I recommend that the NJDOE use its authority to withhold the issuance of charter renewals,<sup>278</sup> if necessary, to pressure individual charter schools into taking more positive steps to ensure equal opportunities for LEP students. It should be noted that the State Board of Education has permitted the NJDOE to issue "conditional" charters with court affirmation.<sup>279</sup> Among the conditions that the NJDOE could impose on schools applying for charter renewal is a requirement that they adopt more effective ways of soliciting greater participation from LEP families.<sup>280</sup> Given the existing track record of New Jersey's

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<sup>277</sup> See *supra* note 48 and accompanying text.

<sup>278</sup> See N.J. STAT. ANN. § 18A:36A-17 (West 1999).

<sup>279</sup> See *In re Englewood on the Palisades Charter Sch.*, 727 A.2d 15, 37-39 (N.J. Super. Ct. App. Div. 1999), *aff'd as modified* by 753 A.2d 687, 699 (N.J. 2000).

<sup>280</sup> The NJDOE is now in the process of revising its regulations to enable it to grant a charter school that applies for charter renewal a one-year "extension," as opposed to a full term of renewal. During that probationary year, the charter school would be obligated to correct deficiencies in its operations in order to subsequently receive a full term. As a condition of approval, the NJDOE could require the school

charter schools, such intimidating tactics by the NJDOE may be necessary to ensure that LEP students do not lose out on these educational opportunities.

*E. Recommendations Regarding Oversight and Accountability*

Most of my previous recommendations pertaining to specific groups of historically disadvantaged students ultimately require the NJDOE to take on more functions and assume more responsibility. This course of action seems essential even though it undermines the basic objective of permitting charter schools maximum freedom from governmental regulation.<sup>281</sup> Simply stated, there are problems that need attending to and state policymakers should not rely solely on charter schools to police themselves. Although charter schools have been deliberately designed to enjoy more independence and less bureaucracy than traditional schools, they—as public schools—must still remain accountable to the public and the public's state representatives. Undoubtedly, the NJDOE is the appropriate agency to provide the requisite oversight. Many commentators who have expressed concern about the treatment of historically disadvantaged students have stressed the importance of increased state oversight to ensure greater charter school accountability.<sup>282</sup> Given past indications that some New Jersey charter schools may have engaged in discriminatory practices or produced discriminatory effects, the NJDOE must be vigilant in its administrative review of charter school policies and programs.<sup>283</sup> As previously emphasized, the New Jersey Supreme Court has clearly recognized this obligation and has directed the NJDOE Commissioner to conduct a comprehensive review on an annual basis as a means of protecting historically

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to develop better recruitment practices regarding LEP students. Should a charter school not comply, it could face possible sanctions, including revocation of its charter.

<sup>281</sup> As noted by many charter school proponents one of the basic objectives is to free charter schools from cumbersome rules and regulations, and other bureaucratic red tape. See NATHAN, *supra* note 3.

<sup>282</sup> See generally Huffman, *supra* note 45; Levin, *supra* note 7; Minow, *supra* note 8.

<sup>283</sup> Vigilance on the part of the NJDOE would become even more important if it succeeds with its proposal to allow New Jersey charter schools to obtain automatic exemption from educational requirements to which other public schools must comply. See New Jersey Dep't of Educ., Evaluation Report (2001) (on file with author).

disadvantaged students enrolled in both charter schools and local school districts.<sup>284</sup>

Despite the fact that the heavily burdened NJDOE may have trouble in carrying out these administrative assignments, it should be able to ease that burden by delegating some of its ministerial duties to other agencies.<sup>285</sup> I recommend that the NJDOE consider authorizing county superintendents, its regional administrative officers, to perform the annual review of individual charter schools.<sup>286</sup> I also recommend that the NJDOE delegate other charter school functions, particularly the investigative research and the dissemination of best practices, to outside agencies, such as the Graduate School of Education at Rutgers University or a newly created charter school support center. Finally, I recommend that the NJDOE pursue its own proposal that would permit, in the context of a pilot program, a respected university such as Rutgers the authority to grant charters and provide primary administrative oversight to a limited number of charter schools.<sup>287</sup> Through such forms of selective delegation, the NJDOE would presumably have more time to devote to major policy issues, including ways to correct perceived discriminatory practices and—equally important—ways to improve student performance at charter schools and at all of New Jersey's public schools.

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<sup>284</sup> In conducting its review, I recommend that the NJDOE consider adopting one of Martha Minow's suggestions: that of allowing parents and community leaders, such as school administrators, to participate or have substantial input into the evaluative process. *See* Minow, *supra* note 8, at 284.

<sup>285</sup> In discussing the NJDOE's capacity to delegate functions, I need to emphasize that the NJDOE cannot and should not delegate its discretionary or policymaking functions. As was pointed out previously, the New Jersey Supreme Court has recently ruled that the State Board and the NJDOE must bear the ultimate responsibility to develop and implement a plan to achieve appropriate racial balance and educational quality in a local school district. The NJDOE cannot delegate such fundamental responsibilities to a county or local school board or to any other administrative agency. *In re* Englewood on the Palisades Charter Sch., 753 A.2d 687, 691–92, 694–95 (N.J. 2000).

<sup>286</sup> County superintendents already ostensibly perform some degree of oversight, since the NJDOE requires that charter schools submit a copy of their annual reports to the county superintendent in addition to the local school district and the NJDOE. *See* N.J. STAT. ANN. § 18A:36A-16(b) (West Supp. 2003).

<sup>287</sup> Martin, *supra* note 194, at 138 (citing N.J. DEP'T OF EDUC., CHARTER SCH. EVALUATION REPORT, COMMISSIONER'S RECOMMENDATIONS 4 (2001), available at [www.state.nj.us/njded/chartsch/evaluation/recommendations.shtml](http://www.state.nj.us/njded/chartsch/evaluation/recommendations.shtml)).

## CONCLUSION

New Jersey's charter school program appears to be operating in general compliance with state and federal laws designed to promote equal educational opportunity for historically disadvantaged students. Moreover, the state's Charter School Program Act expressly prohibits New Jersey charter schools from discriminating on account of a student's intellectual or athletic ability, test scores, status as a disabled person, or proficiency in the English language.<sup>288</sup> The enabling act further requires charter schools to employ a random selection process by a lottery if the number of applications exceeds the number of openings.<sup>289</sup> Most significantly, New Jersey's enabling act requires charter schools, "to the maximum extent practicable, seek a cross section of the community's school age population including racial and academic factors"—thus, to seek enrollment based on a proportionate racial, ethnic, and socioeconomic composition.<sup>290</sup> The State Board of Education and the New Jersey Supreme Court further require the Commissioner to monitor each charter school on an annual basis to ensure compliance with these obligations.<sup>291</sup>

Nevertheless, there are disturbing indications that certain charter schools may not be completely fulfilling their responsibilities. The most discernible problem area involves students with disabilities and students with limited English proficiency. Statistical data suggests, and the NJDOE acknowledges, that most New Jersey charter schools are not admitting and serving as many of these special student populations as one would expect based on the percentage of such students enrolled in the corresponding school districts.<sup>292</sup> Nationwide data furnished by the USDOE Office of Civil Rights lends further credence to this assertion.<sup>293</sup> If charter schools

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<sup>288</sup> See N.J. STAT. ANN. § 18A:36A-7 (West 1999) (allowing charter schools to discriminate based on grade level or area of concentration).

<sup>289</sup> See *id.* § 18A:36A-8(a) (mandating that a charter school use a random selection process).

<sup>290</sup> *Id.* § 18A:36A-8(e) (noting there will be a comprehensive review of testing, civil rights, and safety).

<sup>291</sup> See *id.* § 18A:36A-16(a); *In re Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 694–95 (N.J. 2000) (affirming that the Commissioner must monitor racial impacts).

<sup>292</sup> See *infra* app. D & E.

<sup>293</sup> Martin, *supra* note 194, at app. Q.

have failed to perform their obligation to provide accessibility to such students, they may be violating the IDEA, section 504, and other federal and state civil rights laws.<sup>294</sup>

Another potential problem area derives from the fact that a significant number of charter schools have admitted a substantially lower percentage of students of one particular race, most often African-American, than one would predict given the racial composition of nearby public schools and the corresponding local school district as a whole.<sup>295</sup> Although there may be non-discriminatory reasons for such statistical deviations, so far no one has explained these occurrences, other than through speculation.<sup>296</sup>

Consequently, I have concluded that the Commissioner of Education must make a thorough investigation on a school-by-school basis to determine whether these indications of limited access have arisen because of either intentional or unintentional discriminatory practices. If the investigation yields unsatisfactory results, the Commissioner should consider adopting the recommendations that I have submitted herein as a means of alleviating possible discriminatory practices against historically disadvantaged students. Many of these recommendations are in keeping with suggestions that the NJDOE itself has proposed; in other cases, I have borrowed suggestions that legal scholars and other educational scholars have proposed.

What is most imperative is that the NJDOE accord the state's charter school program serious attention. In this era of financial crisis and increased federal demands, the NJDOE has had to cutback on its staffing and restrict and redirect its priorities.<sup>297</sup> As a result, it runs the risk of not doing what it is

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<sup>294</sup> See *supra* Part II.

<sup>295</sup> See *infra* app. A.

<sup>296</sup> See *supra* note 162 and accompanying text.

<sup>297</sup> At meetings of the Joint Committee on the Public Schools on September 18, 2002 and the Senate Education Committee on September 21, 2002, Dr. William Librera, the New Jersey Commissioner of Education, and his representatives listed several obligations that the state deemed crucial to fulfill but did not include supervision of its charter school program on that list. Among the most pressing obligations that DOE representatives cited were court-imposed requirements in the *Abbott* districts and compliance with federal requirements contained in the No Child Left Behind Act. The Department also noted that, because of budgetary constraints, it has had to reduce the number of personnel in many of its sections, including the section that oversees the state's charter school program. Albert

supposed to be doing with respect to charter schools: providing them with guidance and ensuring that each of them operates in accordance with law and departmental regulations.<sup>298</sup> Without such guidance, charter schools—given their relatively high degree of independence—may intentionally or unintentionally be inclined to ignore some of their responsibilities to historically disadvantaged students.

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Monillas et al., County and Regional Office Study Presented to Dr. William Librera, Commissioner of Education State of New Jersey (Sept. 18, 2002), *available at* [www.state.njded/genfo/reg\\_off\\_study.htm](http://www.state.njded/genfo/reg_off_study.htm).

<sup>298</sup> It is worth noting that the NJDOE continues to vigorously promote the establishment of charter schools in school districts with disproportionately high concentrations of historically disadvantaged students. On January 15, 2004 the NJDOE announced approval of applications submitted on behalf of three new charter schools, scheduled to open within the next two academic years: the Distinction in Urban Education Season Charter School, in Camden; the Freedom Academy Charter School in Camden; and an unnamed school in Irvington. See Melanie Burney, *State Oks 3 Charter Schools*, PHILA. INQUIRER, Jan. 16, 2004, at B04.

## APPENDIX A

### STUDENT ENROLLMENT BY RACE AT NEW JERSEY CHARTER SCHOOLS AND THEIR CORRESPONDING SCHOOL DISTRICTS, 1999-2000\*

| District       | Charter School          | % White | % Black | % Hispanic | % Asian <sup>‡</sup> | % N.A. <sup>##</sup> |
|----------------|-------------------------|---------|---------|------------|----------------------|----------------------|
| Galloway Twp.  |                         | 70.8    | 12.4    | 6.8        | 10.0                 | 0.0                  |
|                | Galloway C.S.           | 74.0    | 15.8    | 5.6        | 4.6                  | 0.0                  |
| Pleasantville  |                         | 2.7     | 71.9    | 24.1       | 1.2                  | 0.1                  |
|                | PleasantTech            | 1.5     | 92.7    | 5.8        | 0.0                  | 0.0                  |
|                | Pleasantville C.S.      | 1.6     | 93.4    | 3.4        | 1.6                  | 0.0                  |
| Englewood City |                         | 2.7     | 64.5    | 29.4       | 3.3                  | 0.1                  |
|                | Englewood/<br>Palisades | 1.9     | 84.9    | 13.2       | 0.0                  | 0.0                  |
| Teaneck Twp.   |                         | 28.1    | 46.9    | 14.7       | 10.0                 | 0.3                  |
|                | Teaneck Community       | 40.0    | 48.4    | 8.4        | 3.2                  | 0.0                  |
| Camden City    |                         | 1.7     | 57.2    | 39.0       | 2.0                  | 0.1                  |
|                | LEAP                    | 0.0     | 51.4    | 48.6       | 0.0                  | 0.0                  |
|                | Camden's Promise        | 2.3     | 81.5    | 16.2       | 0.0                  | 0.0                  |
| East Orange    |                         | 0.1     | 94.6    | 5.1        | 0.1                  | 0.1                  |
|                | East Orange Community   | 0.0     | 97.9    | 2.1        | 0.0                  | 0.0                  |

\* Data prepared in 2003 by the New Jersey Department of Education and submitted upon request to New Jersey State Senator Robert J. Martin, Co-Chair of the Joint Committee on the Public Schools. The categorical terms that appear in this Appendix are those utilized by the New Jersey Department of Education.

‡ The Category "Asian" includes Pacific Islanders.

## The Category "Native American" includes Alaskan Native Americans.

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## CHARTER SCHOOL ACCESSIBILITY

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|                              |                       |      |      |      |      |      |
|------------------------------|-----------------------|------|------|------|------|------|
| Newark                       |                       | 8.7  | 61.9 | 28.5 | 0.7  | 0.2  |
|                              | Robert Treat          | 4.0  | 18.5 | 77.5 | 0.0  | 0.0  |
|                              | North Star            | 0.0  | 88.9 | 11.1 | 0.0  | 0.0  |
| Hoboken                      |                       | 16.4 | 15.5 | 65.5 | 2.5  | 0.1  |
|                              | Elysian               | 42.0 | 17.3 | 27.3 | 13.4 | 0.0  |
|                              | Soaring Heights       | 7.6  | 46.6 | 31.4 | 1.7  | 12.7 |
|                              | Hoboken C.S.          | 49.0 | 13.9 | 33.5 | 3.6  | 0.0  |
| Jersey City                  |                       | 9.2  | 39.0 | 38.6 | 12.5 | 7.0  |
|                              | Learning Community    | 34.1 | 28.3 | 20.4 | 7.2  | 0.0  |
|                              | Golden Door           | 9.1  | 64.7 | 19.6 | 5.8  | 0.8  |
|                              | Jersey City Community | 0.0  | 93.9 | 6.1  | 0.0  | 0.0  |
|                              | Gateway               | 3.0  | 46.5 | 39.4 | 4.0  | 7.1  |
| Princeton Regional Sch. Dis. |                       | 73.3 | 9.3  | 7.3  | 9.7  | 0.4  |
|                              | Princeton C.S.        | 73.8 | 7.3  | 6.1  | 12.8 | 0.0  |
| Trenton                      |                       | 5.2  | 70.2 | 23.8 | 0.7  | 0.1  |
|                              | Emily Fisher          | 1.2  | 86.3 | 12.5 | 0.0  | 0.0  |
|                              | Granville             | 0.0  | 97.0 | 3.0  | 0.0  | 0.0  |
|                              | Greater Trenton       | 10.3 | 67.9 | 21.8 | 0.0  | 0.0  |
|                              | International         | 3.6  | 74.7 | 20.5 | 0.0  | 1.2  |
|                              | Trenton Community     | 0.5  | 95.7 | 3.8  | 0.0  | 0.0  |
| Red Bank                     |                       | 18.6 | 55.0 | 25.1 | 1.3  | 0.0  |
|                              | Red Bank C.S.         | 63.0 | 26.0 | 8.5  | 2.5  | 0.0  |
| Morris-town                  |                       | 57.4 | 19.5 | 18.4 | 4.7  | 0.0  |
|                              | Unity C.S.            | 81.1 | 8.9  | 7.8  | 2.2  | 0.0  |
| Clifton                      |                       | 57.0 | 3.3  | 31.2 | 8.4  | 0.1  |
|                              | Classical Academy     | 59.2 | 14.1 | 18.3 | 8.4  | 0.0  |
| Sparta                       |                       | 97.0 | 0.2  | 1.8  | 0.9  | 0.1  |
|                              | Sussex                | 98.9 | 0.0  | 1.1  | 0.0  | 0.0  |

## APPENDIX B

### ENROLLMENT OF ECONOMICALLY DISADVANTAGED STUDENTS AT NEW JERSEY CHARTER SCHOOLS AND THEIR CORRESPONDING SCHOOL DISTRICTS, 1999-2000\*

| District       | Charter School           | % Eligible for Free & Reduced Lunch <sup>‡</sup> |
|----------------|--------------------------|--|
| Galloway Twp.  |                          | 14.4   |
|                | Galloway C.S.            | 18.4   |
| Pleasantville  |                          | 77.4   |
|                | PleasantTech             | 83.5   |
|                | Pleasantville C.S.       | 82.2   |
| Englewood City |                          | 47.0   |
|                | Englewood/<br>Palisades  | 66.0   |
| Teaneck Twp.   |                          | 15.3   |
|                | Teaneck Community        | 9.7  |
| Camden City    |                          | 84.9   |
|                | LEAP                     | 81.5   |
|                | Camden's Promise         | 73.1   |
| East Orange    |                          | 77.3   |
|                | East Orange<br>Community | 86.9   |
| Newark         |                          | 80.3   |
|                | Robert Treat             | 76.5   |
|                | North Star               | 88.2   |
| Hoboken        |                          | 75.9   |
|                | Elysian                  | 41.3   |
|                | Soaring<br>Heights       | 72.0   |
|                | Hoboken C.S.             | 42.3   |
| Jersey City    |                          | 72.6   |

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\* Data prepared in 2003 by the New Jersey Department of Education and submitted upon request to New Jersey State Senator Robert J. Martin, Co-Chair of the Joint Committee on the Public Schools.

<sup>‡</sup> Eligibility for Free and Reduced Lunch is a Federal Program, administered by the United States Department of Education, that is based on the income of a student's family.

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|                                 |                          |       |
|---------------------------------|--------------------------|-------|
|                                 | Learning Community       | 46.1  |
|                                 | Golden Door              | 100.0 |
|                                 | Jersey City<br>Community | 83.7  |
|                                 | Gateway                  | 53.5  |
| Princeton Regional<br>Sch. Dis. |                          | 9.2   |
|                                 | Princeton C.S.           | 11.0  |
| Trenton                         |                          | 69.0  |
|                                 | Emily Fisher             | 88.8  |
|                                 | Granville                | 31.0  |
|                                 | Greater<br>Trenton       | 78.8  |
|                                 | International            | 85.5  |
|                                 | Trenton Community        | 45.2  |
| Red Bank                        |                          | 71.4  |
|                                 | Red Bank C.S.            | 46.3  |
| Morristown                      |                          | 24.2  |
|                                 | Unity C.S.               | 2.2   |
| Clifton                         |                          | 29.4  |
|                                 | Classical Academy        | 32.4  |
| Sparta                          |                          | 1.9   |
|                                 | Sussex<br>County C.S.    | 9.9   |

## APPENDIX C

### STUDENT ENROLLMENT BY GENDER AT NEW JERSEY CHARTER SCHOOLS AND THEIR CORRESPONDING SCHOOL DISTRICTS, 1999-2000\*

| District       | Charter School           | % Male | % Female |
|----------------|--------------------------|--------|----------|
| Galloway Twp.  |                          | 50.8   | 49.2     |
|                | Galloway C.S.            | 52.0   | 48.0     |
| Pleasantville  |                          | 51.1   | 48.9     |
|                | PleasantTech             | 51.5   | 48.5     |
|                | Pleasantville C.S.       | 45.7   | 54.3     |
| Englewood City |                          | 50.9   | 49.1     |
|                | Englewood/<br>Palisades  | 43.4   | 56.5     |
| Teaneck Twp.   |                          | 51.2   | 48.8     |
|                | Teaneck<br>Community     | 49.7   | 50.3     |
| Camden City    |                          | 49.2   | 50.8     |
|                | LEAP                     | 47.5   | 52.5     |
|                | Camden's<br>Promise      | 48.6   | 51.4     |
| East Orange    |                          | 51.5   | 48.5     |
|                | East Orange<br>Community | 48.6   | 51.4     |
| Newark         |                          | 50.9   | 49.1     |
|                | Robert Treat             | 47.5   | 52.5     |
|                | North Star               | 43.1   | 56.9     |
| Hoboken        |                          | 52.3   | 47.7     |
|                | Elysian                  | 58.7   | 41.3     |

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\* Data prepared in 2003 by the New Jersey Department of Education and submitted upon request to New Jersey State Senator Robert J. Martin, Co-Chair of the Joint Committee on the Public Schools.

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|                              |                       |      |      |
|------------------------------|-----------------------|------|------|
|                              | Soaring Heights       | 50.8 | 49.2 |
|                              | Hoboken C.S.          | 51.5 | 48.5 |
| Jersey City                  |                       | 51.2 | 48.8 |
|                              | Learning Community    | 50.3 | 49.7 |
|                              | Golden Door           | 55.0 | 45.0 |
|                              | Jersey City Community | 49.0 | 51.0 |
|                              | Gateway               | 53.5 | 46.5 |
| Princeton Regional Sch. Dis. |                       | 52.1 | 47.9 |
|                              | Princeton C.S.        | 59.8 | 40.2 |
| Trenton                      |                       | 49.1 | 50.9 |
|                              | Emily Fisher          | 57.5 | 42.5 |
|                              | Granville             | 49.2 | 50.8 |
|                              | Greater Trenton       | 53.8 | 46.2 |
|                              | International         | 47.0 | 53.0 |
|                              | Trenton Community     | 48.1 | 51.9 |
| Red Bank                     |                       | 52.8 | 47.2 |
|                              | Red Bank C.S.         | 51.2 | 48.8 |
| Morristown                   |                       | 52.0 | 48.0 |
|                              | Unity C.S.            | 54.4 | 45.6 |
| Clifton                      |                       | 51.5 | 48.5 |
|                              | Classical Academy     | 43.9 | 50.7 |
| Sparta                       |                       | 52.2 | 47.8 |
|                              | Sussex County C.S.    | 61.5 | 38.5 |

## APPENDIX D

### ENROLLMENT OF SPECIAL EDUCATION STUDENTS AT NEW JERSEY CHARTER SCHOOLS AND THEIR CORRESPONDING SCHOOL DISTRICTS, 1999-2000\*

| Charter School                           | %<br>Spec.<br>Ed. | District          | %<br>Spec.<br>Ed |
|--|-------------------|-------------------|------------------|
| Academy Charter<br>H.S.                  | 0.0               | Regional**        |                  |
| CALLA C.S.                               | 2.5               | Plainfield        | 9.5              |
| Camden's Promise                         | 8.5               | Camden            | 9.8              |
| Classical Academy                        | 4.3               | Clifton           | 5.9              |
| Liberty Academy C.S.                     | 3.9               | Jersey City       | 10.0             |
| Discovery C.S.                           | 3.3               | Newark            | 6.4              |
| Elysian C.S.                             | 3.3               | Hoboken           | 7.6              |
| Emily Fisher C.S. of<br>Advanced Studies | 39.0              | Trenton           | 7.2              |
| Englewood on the<br>Palisades            | 0.0               | Englewood         | 7.8              |
| Family Alliance C.S.                     | 5.8               | Regional**        |                  |
| Franklin C.S.                            | 9.0               | Franklin Township | 6.1              |
| Galloway Community<br>C.S.               | 0.0               | Galloway Township | 3.9              |
| Gateway C.S.                             | 9.0               | Jersey City       | 10.0             |
| Granville C.S.                           | 5.4               | Jersey City       | 7.2              |
| Granville Middle C.S.                    | 0.0               | Trenton           | 7.2              |
| Greater Brunswick<br>C.S.                | 7.1               | Regional**        |                  |

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|                                |      |                    |      |
|--------------------------------|------|--------------------|------|
| Greater Trenton AC & Tech H.S. | 11.3 | Trenton            | 7.2  |
| Greenville Community C.S.      | 0.0  | Jersey City        | 10.0 |
| Alexander Hamilton C.S.        | 1.2  | Paterson           | 4.2  |
| Hoboken C.S.                   | 6.7  | Hoboken            | 7.6  |
| International C.S.             | 1.2  | Trenton            | 7.2  |
| Jersey City Community C.S.     | 0.0  | Jersey City        | 10.0 |
| Jersey City Golden Door        | 6.4  | Jersey City        | 10.0 |
| LEAP Academy C.S.              | 9.0  | Camden             | 9.8  |
| Learning Community C.S.        | 2.3  | Jersey City        | 10.0 |
| Marion P. Thomas Academy C.S.  | 8.3  | Newark             | 6.4  |
| New Horizons Community C.S.    | 4.8  | Newark             | 6.4  |
| North Star Academy C.S.        | 2.1  | Newark             | 6.4  |
| Charter Tech H.S.              | 11.2 | Regional**         |      |
| Oceanside C.S.                 | 5.8  | Atlantic City      | 1.7  |
| PleasantTech Academy           | 7.9  | Pleasantville      | 2.0  |
| Princeton C.S.                 | 2.4  | Princeton Regional | 1.3  |
| Red Bank C.S.                  | 13.4 | Red Bank Borough   | 8.8  |
| Robert Treat Academy C.S.      | 0.0  | Newark             | 6.4  |
| Maria L. Variso-Rogers C.S.    | 0.0  | Newark             | 6.4  |
| Samuel DeWitt Proctor Academy  | 15.6 | Trenton            | 7.2  |
| Soaring Heights C.S.           | 5.9  | Jersey City        | 10.0 |
| Sussex County C.S. Technology  | 12.4 | Sparta             | 2.4  |

|                        |      |         |     |
|------------------------|------|---------|-----|
| Teaneck Community C.S. | 6.6  | Teaneck | 2.0 |
| Trenton Community C.S. | 9.5  | Trenton | 7.2 |
| Unity C.S.             | 12.2 | Morris  | 7.4 |
| The Village C.S.       | 0.0  | Trenton | 7.2 |

## APPENDIX E

### ENROLLMENT OF STUDENTS WITH LIMITED ENGLISH PROFICIENCY AT NEW JERSEY CHARTER SCHOOLS AND THEIR CORRESPONDING SCHOOL DISTRICTS, 1999-2000\*

| Charter School                        | # LEP‡ | % LEP | District      | # LEP | % LEP |
|---------------------------------------|--------|-------|---------------|-------|-------|
| Academy Charter H.S.                  | 0      | 0.00  | Regional***   |       |       |
| CALLA C.S.                            | 0      | 0.00  | Plainfield    | 846   | 11.31 |
| Camden's Promise                      | 2      | .70   | Camden        | 1155  | 6.09  |
| Classical Academy                     | 0      | 0.00  | Clifton       | 5838  | 0.00  |
| Liberty Academy C.S.                  | 12     | 2.90  | Jersey City   | 2486  | 7.85  |
| Discovery C.S.                        | 0      | 0.00  | Newark        | 3682  | 8.75  |
| East Orange Community                 | 0      | 0.00  | East Orange   | 342   | 2.99  |
| Elysian C.S.                          | 1      | 0.50  | Hoboken       | 63    | 2.60  |
| Emily Fisher C.S. of Advanced Studies | 0      | 0.00  | Trenton       | 739   | 6.19  |
| Englewood of Palisades                | 0      | 0.00  | Englewood     | 274   | 10.26 |
| Family Alliance C.S.                  | 0      | 0.00  | Regional***   |       |       |
| Franklin C.S.                         | 0      | 0.00  | Franklin Twp. | 252   | 4.54  |
| Galloway Community                    | 6      | 5.00  | Galloway Twp. | 151   | 3.88  |

\* Data prepared in 2003 by the New Jersey Department of Education and submitted upon request to New Jersey State Senator Robert J. Martin, Co-Chair of the Joint Committee on the Public Schools.

‡ LEP refers to Students with Limited English Proficiency.

‡‡ Regional schools draw from several school districts; additional data is needed to break down the percentages for these charter schools from the contributing school districts.

|                                |    |      |               |      |       |
|--------------------------------|----|------|---------------|------|-------|
| C.S.                           |    |      |               |      |       |
| Gateway C.S.                   | 0  | 0.00 | Jersey City   | 2486 | 7.85  |
| Granville C.S.                 | 0  | 0.00 | Trenton       | 739  | 6.19  |
| Granville Middle C.S.          | 0  | 0.00 | Trenton       | 739  | 6.19  |
| Gray C.S.                      | 0  | 0.00 | Newark        | 3682 | 8.75  |
| Greater Brunswick C.S.         | 5  | 3.5  | Regional***   |      |       |
| Greater Trenton AC & Tech H.S. | 0  | 0.00 | Trenton       | 739  | 8.19  |
| Alexander Hamilton C.S.        | 0  | 0.00 | Paterson      | 3506 | 14.27 |
| Hoboken C.S.                   | 0  | 0.00 | Hoboken       | 63   | 2.60  |
| International C.S.             | 0  | 0.00 | Trenton       | 739  | 6.19  |
| Jersey City Community C.S.     | 0  | 0.00 | Jersey City   | 2486 | 7.85  |
| Jersey City Golden Door        | 0  | 0.00 | Jersey City   | 2486 | 7.85  |
| LEAP Academy C.S.              | 19 | 3.90 | Camden        | 1155 | 6.09  |
| Learning Center                | 0  | 0.00 | Atlantic City | 865  | 12.40 |
| Learning Community C.S.        | 0  | 0.00 | Jersey City   | 2486 | 7.85  |
| Marion P. Thomas Academy C.S.  | 0  | 0.00 | Newark        | 3682 | 8.75  |
| New Horizons Community C.S.    | 0  | 0.00 | Newark        | 3682 | 8.75  |
| Newark C.S.                    | 0  | 0.00 | Newark        | 3682 | 8.75  |
| North Star Academy C.S.        | 0  | 0.00 | Newark        | 3682 | 8.75  |
| Charter Tech                   | 0  | 0.00 | Regional***   |      |       |

2004]

## CHARTER SCHOOL ACCESSIBILITY

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|  |   |      |                  |      |       |
|--|---|------|------------------|------|-------|
| Oceanside C.S.                         | 1 | .30  | Atlantic City    | 865  | 12.40 |
| PACE                                   | 0 | 0.00 | Hamilton Twp.    | 212  | 1.67  |
| Paterson C.S. for Urban Leadership     | 0 | 0.00 | Paterson         | 3506 | 14.27 |
| PleasantTech Academy                   | 1 | 0.30 | Pleasantville    | 263  | 6.92  |
| Pleasantville C.S. Academic Excellence | 0 | 0.00 | Pleasantville    | 263  | 6.92  |
| Princeton C.S.                         | 1 | 0.50 | Princeton Reg.   | 133  | 4.20  |
| Queens City C.S.                       | 0 | 0.00 | Plainfield       | 846  | 11.31 |
| Red Bank C.S.                          | 0 | 0.00 | Red Bank Borough | 94   | 13.86 |
| Robert Treat Academy C.S.              | 6 | 2.40 | Newark           | 3682 | 8.75  |
| Maria L. Variso-Rogers C.S.            | 0 | 0.00 | Newark           | 3682 | 8.75  |
| Soaring Heights C.S.                   | 0 | 0.00 | Jersey City      | 2486 | 7.85  |
| Sussex County C.S. Technology          | 0 | 0.00 | Sparta           | 17   | 0.50  |
| Teaneck Community C.S.                 | 0 | 0.00 | Teaneck          | 101  | 2.19  |
| Trenton Community C.S.                 | 0 | 0.00 | Trenton          | 739  | 6.19  |
| Unity C.S.                             | 0 | 0.00 | Morris           | 413  | 9.17  |
| The Village C.S.                       | 0 | 0.00 | Trenton          | 739  | 6.19  |